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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 359

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER,

vs.

GILLETTE MOTOR TRANSPORT, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 28, 1959
CERTIORARI GRANTED NOVEMBER 9, 1959

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Tax Court Docket No. 58364

Circuit Court Docket No. 17280

GILLETTE MOTOR TRANSPORT, INC., Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE, Respondent

STIPULATION AS TO PRINTING RECORD—Filed June 16, 1958

In accordance with Rule 23 (3) and (10) of the Rules of the United States Court of Appeals for the Fifth Circuit, it is hereby stipulated by the respective parties hereto, through their counsel, that the printed record in the above entitled action shall consist of the following:

1. Pleadings before the Tax Court, as follows:

(a) Petition.
(b) Answer.
(c) Amended Petition.
(d) Answer to Amended Petition.

[fol. 2] 2. Stipulation of Facts together with Exhibits 4-D; 5-E; 6-F; 7-G; 8-H; 9-I; 10-J; 11-K; that portion of Exhibit 12-L which consists of the "Reasons For Findings and Conclusions" of the Motor Carrier Claims Commission in the determination of R-B Freight Lines, Inc. v. United States, more particularly pages 28 through 50 of the said exhibit; and 13-M, attached thereto.

3. Opinion of the Tax Court.

4. Decision of the Tax Court dated February 13, 1958.

5. Joint Motion to Correct the Opinion and Vacate the Decision of the Tax Court of February 13, 1958.

6. Order of the Tax Court.

7. Decision of the Tax Court dated April 17, 1958.

8. Petition for Review.

9. Designation of Contents of Record on Review.

10. Docket Entries of Proceedings Before the Tax Court.

11. This stipulation of the portions of the record to be printed.

[fol. 3] Dated this 12th day of June, 1958.

Joseph A. Maun, 425 Hamm Building, St. Paul 2, Minnesota.

Of Counsel: Bundlie, Kelley and Maun, 425 Hamm Building, St. Paul 2, Minnesota. Charles K. Rice, Assistant Attorney General, Tax Division, Attorney for Respondent.

IN THE UNITED STATES COURT OF APPEALS

STIPULATION AS TO EXHIBITS WHICH ARE NOT TO BE PRINTED—Filed June 18, 1958

As to exhibits which are not stipulated to be included in the printed record in the above-entitled case, but which are a part of the record with this Court, it is hereby stipulated by the respective parties hereto, through their counsel, that such exhibits shall be treated as physical exhibits so that either party to the appeal may refer to, quote from, or include in his or its brief or oral argument [fol. 4] any part or all of the said exhibits in the same manner as if the said exhibits were printed in the record in their entirety.

Charles K. Rice, Assistant Attorney General, Attorney for Respondent. Joseph A. Maun, Attorney for Petitioner.

Approved: (s.) John Minor Wisdom, U. S. Circuit Judge. June 18, 1958.

[fol. 5] IN THE TAX COURT OF THE UNITED STATES

GILLETTE MOTOR TRANSPORT, INC., Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE, Respondent

DOCKET ENTRIES

APPEARANCES:

For Petitioner: Joseph A Maun, Esq., William R. Busch, Esq., Lee N. Johnson, Esq.

For Rsepondent: Thomas E. Tyre, Esq.

DOCKET No. 58,364.

1955

June 9—Petition received and filed. Taxpayer notified. Fee paid.

June 9—Copy of petition served on General Counsel.

June 9—Request for Circuit hearing in Dallas, Texas filed by taxpayer. 6/13/55, granted.

July 25—Answer filed by G. C.

July 27—Copy of answer served on taxpayer, Dallas, Texas.

1956

Jan. 16—Motion and request for an early hearing date, with attached affidavit in support of motion, filed by petr. Served 1/18/56.

Jan. 18—Hearing set 2/8/56, Wash. D.C., on petr's. motion of 1/16/56.

[fol. 6]

Feb. 8—Hearing had before Judge Murdock on petr's. motion for hearing in Dallas, March 12, 1956. Order denied. Respdt's. memorandum in opposition to petr's. motion filed at hearing.

Feb. 8—Motion of Jan. 16, 1956 is denied.

Aug. 27—Motion that proceeding be placed on the Oct. 8, 1956 cal. at Dallas, Texas, with affidavit attached, filed by petitioner. Served 8/28/56.

Aug. 27—Hearing set on Petr's motion 9/12/56, Wash. D.C. Served 8/28/56.

Docket Entries

1956

Sept. 5—Entry of appearance of Lee N. Johnson as counsel filed.

Sept. 10—Affidavit in support of Petr's motion of 8/27/56 filed by Petr.

Sept. 12—Hearing had before Judge Murdock on Petr's. motion for an early hearing date. Memorandum of Respondent in opposition to Petr's. motion filed., Served 9/11/56.

Sept. 12—Motion of Aug. 27, 1956 is denied. Served 9/17/56.

Nov. 5—Motion for leave to amend petition, amended petition lodged, filed by petr. Granted 11/5/56. Served 11/8/56.

Dec. 3—Answer to amended petition filed by Resp. Served 12/5/56.

1957

Feb. 27—Motion to place case on the Apr. 1, 1957, Dallas, Texas calendar, with attached affidavit, filed by petr. Served 3/6/57.

Mar. 5—Hearing set on Petr's. motion 3/13/54, Wash. D.C. Served 3/6/57.

Mar. 13—Hearing had before Judge Murdock on Petr's. motion for trial at Dallas, Texas, 4/1/57.

[fol. 7]

Mar. 13—Order, that Petr's motion to set case for trial at Dallas, Texas, 4/1/57, is denied, entered. Served 3/20/57.

July 24—Trial set Oct. 28, 1957, Dallas, Texas.

Nov. 1—Trial had before Judge Train on merits. Stip. of Facts with exs. filed at hearing. Briefs due Dec. 31, 1957, replies due Jan. 30, 1958.

Nov. 25—Transcript of Hearing Oct. 28, 30, and Nov. 1, 1957.

Dec. 19—Brief for Resp. filed. Served 1/6/58.

Dec. 30—Brief for Petr. filed. Served 1/6/58.

1958

Feb. 12—Memo. opinion filed, Judge Train. Dec. will be for Resp. Served 2/12/58.

Feb. 13—Decision entered, Judge Train. Served 2/17/58.

DOCKET ENTRIES

1958

Mar. 4—Joint motion to correct opinion and vacate decision filed.

Mar. 6—Order that Court's opinion be corrected and the decision of 2/13/58 be vacated, entered.

Apr. 14—Agreed Computation filed.

Apr. 17—Decision entered, Judge Train.

May 6—Order fixing amount of bond at $93,000.00 entered.

May 9—Petition for review by U. S. Ct. of Ap. 5th with assignments of error filed by petr.

May 9—Proof of service of petition for review filed.

May 9—Designation of Contents of record on review with proof of service thereon filed by petr.

May 21—Stipulation for transmission of original Ex. 12-L 10 days before argument filed.

May 22—Order for transmission of original exhibits.

[fol. 8] IN THE TAX COURT OF THE UNITED STATES

PETITION—Filed Jun. 9, 1955

[Title omitted]

The above named petitioner hereby petitions for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency dated May 11, 1955, and as the basis of its proceeding, alleges as follows:

I

The petitioner is a corporation organized and existing under and by virtue of the laws of the State of Texas, with principal offices in Dallas, Texas. The returns for the period here involved were filed with the Director of Internal Revenue for the District of Texas on or before March 15, 1953 and March 15, 1954, respectively.

II

The notice of deficiency, a copy of which is attached hereto marked "Exhibit A" and made a part hereof, was mailed to the petitioner on May 11, 1955.

III

The deficiencies as determined by the Commissioner of Internal Revenue are for income taxes for the calendar years 1952 and 1953 in the respective amounts of $57,111.13 [fol. 9] and $18,097.38, of which the whole of each is in dispute.

IV

The determination of tax set forth in said notice of deficiency is based upon the following errors:

(A) The Commissioner erroneously determined that the $157,843.99 which the petitioner received from the United States of America in payment of an award entered in favor of the petitioner by the Motor Carrier Claims Commission by order dated March 31, 1952 was includible as ordinary income in the petitioner's taxable income for the calendar year 1952.

(B) The Commissioner erroneously determined that the petitioner did not sustain an operating loss of $36,634.37 in 1952 and the Commissioner erroneously disallowed as an operating loss deduction in 1953 the $36,634.37 operating loss which the petitioner suffered in 1953.

V

The fact upon which the petitioner relies as a basis of this proceeding are as follows:

(A) On August 11, 1944, the United States of America, pursuant to Executive Order No. 8462 issued by the President of the United States in excess of the powers granted by the Constitution of the United States, including the power of eminent domain, seized and took possession of all the real and personal property and other assets of the taxpayer used or useful in connection with the operation of [fol. 10] its motor carrier transportation system, thereby depriving this taxpayer of the use and possession of said property. Included in the property of the taxpayer thus seized by the United States of America on August 11, 1944 were five passenger or service vehicles, fifty-five tractor-trailer combinations, fourteen spare tractors, twenty-three pick-up and delivery trucks, and miscellaneous office furniture and equipment. In purchase of a petition filed by the

taxpayer with the Motor Carrier Claims Commission as provided by law, an order was entered by the Motor Carrier Claims Commission on March 31, 1952, awarding to the taxpayer just compensation under the Fifth Amendment to the Constitution of the United States as a result of the seizure and acquisition of the taxpayer's property by the United States of America on August 11, 1944. Subsequent thereto and prior to December 31, 1952, the taxpayer received from the United States of America $157,843.99 in full payment of the aforesaid award entered in its favor by the Motor Carrier Claims Commission. No part of the amount so received by this taxpayer is includible and taxable as part of its ordinary income for the calendar year 1953. Attached hereto marked "Exhibit B" and hereby made a part hereof is a true and correct copy of the aforesaid award order of March 31, 1952 which was entered by the Motor Carrier Claims Commission.

(B) During the calendar year 1952 the petitioner suffered an operating loss in the amount of $36,634.37. Under Sections 23 (f) and 122 of the Internal Revenue Code of 1939, as amended, the petitioner was entitled to carry forward this loss to 1953 and to claim the whole thereof as a deduction in computing its taxable income for the calendar year 1953.

[fol. 11] Wherefore, the petitioner prayes that this Court may hear the proceeding and determine that the petitioner owes no further or additional income taxes for the calendar years 1952 and 1953.

/s/ Joseph A. Maun, William R. Bush,

Of Counsel: Bundlie, Kelley and Maun, 425 Hamm Building, Saint Paul 2, Minnesota.

Duly sworn to by Fred Gillette and Ben H. Lovvorn (Jurats omitted in printing).

[fol. 12] EXHIBITS A TO PETITION

U. S. Treasury Department
Internal Revenue Service
District Director
Lynch Building, 2101 Pacific Avenue
Dallas, Texas

DIR:A:Rev:DAL:90-D

Gillette Motor Transport, Inc.
2321 Butler Street,
Dallas, Texas.

GENTLEMEN:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1952, and December 31, 1953, discloses deficiencies aggregating $75,208.51 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In ~~counting the~~ 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

[fol. 13] Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to this office for the attention of A:Rev:GVL. by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours, T. Coleman Andrews, Commissioner of Internal Revenue. By /s/ Ellis Campbell, Jr., District Director of Internal Revenue.

Enclosures: Statement, Form 1276, Agreement Form.

DIR:A:Rev:DAL:90-D

Statement

Income Tax Liability for the Taxable Years Ended December 31, 1952 and December 31, 1953.

Year	Income Tax Liability	Income Tax Assessed	Income Tax Deficiency
1952	$57,111.13	$ —0—	$57,111.13
1953	29,452.31	11,354.93	18,097.38
Total	$86,563.44	$11,354.93	$75,208.51

[fol. 14] In making this determination of your income tax liabilities careful consideration has been given to the original report of examination dated February 15, 1955 and supplement report dated April 18, 1955. Copy of the supplemental report is being mailed you under separate cover.

Schedule 1

Taxable Year Ended December 31, 1952

Adjustments to Net Income

Net loss as disclosed by return		($ 36,634.37)
Additional Income:		
(a) Motor claims commission award	$157,843.99	
Additional Deductions:		
(b) Donations	(803.60)	157,040.39
Net income as determined		$120,406.02

Gillette Motor Transport, Inc.,
2321 Butler Street,
Dallas, Texas.

[fol. 15]

Statement

Schedule 1-A

Taxable Year Ended December 31, 1952

Explanation of Adjustments

(a) It is held that the $157,843.99 award from Motor Carrier Claims Commission constitutes gross income under Section 22 of the 1939 Internal Revenue Code. The award is detailed as follows:

Rental		$130,241.29
Less operating profit during period of seizure		7,315.08
Net rental allowance		$122,926.21
Interest on above amount at 4% from June 16, 1945, to July 23, 1952		34,917.78
Total		$157,843.99

(b) To allow donations which had been charged to surplus because of the loss disclosed on return.

Schedule 2

Taxable Year Ended December 31, 1952

Computation of Tax

Net income, Schedule 1	$120,406.02
Combined normal tax and surtax: 52% less $5,500.00	57,111.13
Tax liability shown on return, CN 909	—0—
Deficiency in income tax	$ 57,111.13

[fol. 16]

Schedule 3

Taxable Year Ended December 31, 1953

Adjustments to Net Income

Net income as disclosed by return		$32,413.33
Unallowable deductions and additional income:		
(a) Net operating loss deduction	$36,634.37	
Additional deductions:		
(b) Contributions	(1,831.71)	34,802.66
Net income as determined		$67,215.99

Gillette Motor Transport, Inc., 2321 Butler Street, Dallas, Texas.

Statement

Schedule 3-A

Taxable Year Ended December 31, 1953

Explanation of Adjustments

(a) It is held that no operating loss was sustained in 1952; therefore, claimed net operating loss deduction of $36,634.37 is disallowed.

(b) Additional contributions of $1,831.71 are allowable.

[fol. 17]

Net income per return before contribution deduction	$34,119.30
Add: Adjustment (a) above	36,634.37
	$70,753.67
Allowable contributions: 5% of $70,753.67	$ 3,537.68
Contributions claimed on return	(1,705.97)
Additional contributions	$ 1,831.71

Schedule 4

Taxable Year Ended December 31, 1953

Computation of Tax

Net income, Schedule 3	$67,215.99
Combined normal tax and surtax: 52% less $5,500.00	29,452.31
Tax assessed on original return, CI 513	11,354.93
Deficiency in income tax	$18,097.38

[fol. 18] EXHIBIT B TO PETITION

Before the Motor Carrier Claims Commission, Kansas City, Missouri

No. 32

GILLETTE MOTOR TRANSPORT, INC., Petitioner,

vs.

THE UNITED STATES, Respondent

FINAL DETERMINATION

The Commission makes the following

FINDINGS OF FACT

1

Gillette Motor Transport, Inc., is and was at all times material to this action a corporation of Texas, with its principal place of business at Dallas, Texas.

2

On and for some time prior to August 11, 1944, petitioner was authorized by appropriate Governmental agencies, both state and Federal, to engage in business as a common carrier of property by motor vehicle, and did operate its system and properties in pursuance of such business in the transportation of general commodities between various cities and towns located in a geographical area surrounding its principal place of business.

3

In conducting its transportation business, petitioner owned and operated motor tractors, trucks, semi-trailers [fol. 19] and pick-up and delivery trucks. Petitioner also owned or used certain real estate, and miscellaneous personal property such as office machines and equipment, shop and garage machines and equipment, and other items of property necessary and useful in a transportation business.

4

Petitioner and other motor carriers in the midwest were first required to enter into contracts with the union representing over-the-road drivers in 1939. The first contract was for the period from November 15, 1939 to November 15, 1941, and was the same contract then in effect or being placed in effect in the central states area. Similar contracts were placed in effect for period from November 15, 1941 to November 15, 1943, although the midwest carriers sought to obtain a modification or "differential."

5

In 1943 a group of carriers in the midwest with common interest and similar operating conditions, including the petitioner, organized the Midwest Operators Association. This Association sought to negotiate a separate contract with the union.

6

The negotiations between Midwest Operators Association and the union became deadlocked, and on October 13, 1943, the matter was certified to the National War Labor Board.

[fol. 20]

7

On February 7, 1944, the National War Labor Board decided that the wage rates should be increased by 7¢ per hour and three-tenths of a cent per mile.

8

Midwest Operators Association appealed to the National War Labor Board for a rehearing and reconsideration.

Reconsideration was refused. The new contract was not put into effect by the midwestern motor carriers.

9

During the period from February 7, 1944, to August 4, 1944, midwestern carriers, including the petitioner, continued to operate under the terms of the old contract. On August 4, 1944, a strike was begun by the drivers employed by the 103 carriers, members of the Midwest Operators Association, including the petitioner.

10

The petitioner recognized the fact that a refusal to sign the contract might result in a strike, and prior to August 4, 1944, the managment of petitioner discussed the problem and determined that petitioner would have to "take" the strike because it could not afford to pay the wage increases involved.

11

After the strike of the drivers began on August 4, 1944, petitioner continued the transportation of perishable goods [fol. 21] and general commodities in transit and on petitioner's docks. Thereafter, except for a period of two or three days when petitioner was entirely inoperative, petitioner continued to transport Government freight and war materials, with the consent of the union, until August 11, 1944, when all of its operations were shut down. Petitioner resumed operations on or about August 14, 1944.

12

On August 11, 1944, the President of the United States signed and issued Executive Order No. 9462, which order read as follows:

"Executive Order No. 9462.

Possession and Operation of Certain Motor Carrier Transportation Systems

"Whereas, after investigation I find and proclaim that the motor carrier transportation systems of the motor carriers named in the list attached hereto and made a part

hereof are equipped for the transportation of materials of war and supplies that are required for the war effort, or useful in connection therewith, and are now engaged in such transportation; that there are threatened interruptions of the operation of said transportation systems as a result of a labor disturbance; that the war effort will be unduly impeded or delayed by such interruptions; that it has become necessary in the national defense to take possession and assume control of the said transportation systems for needful and desirable purposes connected with the prosecution of the war and that they be operated by or [fol. 22] for the United States; and that the exercise as hereinafter specified, of the powers vested in me is necessary to insure, in the interest of the war effort, the operation of said systems;

"Now Therefore, by virtue of the power and authority vested in me by the Constitution and laws of the United States, including the Act of August 29, 1916, 39 Stat. 645, the First War Powers Act, 1941, and Section 9 of the Selective Training and Service Act of 1940 as amended by the War Labor Disputes Act, as President of the United States and Commander in Chief of the Army and Navy, it is hereby ordered as follows:

"1. The Director of the Office of Defense Transportation is authorized and directed, through or with the aid of any public officers, Federal Agencies, or other Government instrumentalities, that he may designate, to take possession and assume control of, and to operate, or arrange for the operation of, the motor carrier transportation systems of the motor carriers named in the list attached hereto and made a part hereof, including all real and personal property and other assets, wherever situated, used or useful in connection with the operation of such systems, in such manner as he may deem necessary for the successful prosecution of the war; and to do anything that he may deem necessary to carry out the provisions and purposes of this order.

"2. Subject to the applicable provisions of existing law, including the orders of the Office of Defense Transportation, issued pursuant to Executive Orders 8989, as amended, 9156 and 9294, the said transportation systems shall be managed and operated under the terms and conditions of

[fol. 23] employment in effect between the carriers and the collective bargaining agents at the time possession is taken under this order. During his operation of said transportation systems the Director shall observe the terms and conditions of the directive order of the National War Labor Board, dated February 7, 1944; provided, however, that in the case of each said transportation system the Director is authorized to pay the wage increases provided for by the said directive order of the National War Labor Board, which accrued prior to the taking of possession of said system under this order, only out of the net operating revenue of the said system.

"3. Except with the prior written consent of the Director, no attachment by mesne process, garnishment, execution, or otherwise shall be levied on or against any of the real or personal property or other assets, tangible, or intangible, in the possession of the Director hereunder.

"4. Possession, control, and operation of any transportation system, or any part thereof, or any real or personal property, taken under this order shall be terminated by the Director when he determines that such possession, control, and operation are no longer necessary for the successful prosecution of the war.

"5. For the purposes of paragraph 1 to 4, inclusive, of this order, there are hereby transferred to the Director the functions, powers, and duties vested in the Secretary of War by that part of Section 1 of the said Act of August 29, 1916, reading as follows:

[fol. 24] 'The President, in time of war, is empowered through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable.'

"6. Upon request of the Director of the Office of Defense Transportation the Secretary of War is authorized to take any action that may be necessary to enable the Director to carry out the provisions and purposes of this Order.

"The White House.

/s/ Franklin D. Roosevelt".

The carriers named in the list referred to in the Order and attached thereto were all members of Midwest Operators Association, and the list included the name of the petitioner herein.

13

On the same date, August 11, 1944, the Director of the Office of Defense Transportation sent to the petitioner and petitioner received a telegram which read as follows:

August 11, 1944.

"By Order of the President and on behalf of the United States I have today issued an Order taking possession and [fol. 25] control as of 12:01 A.M. on August 12, 1944, of your motor carrier transportation system and all property used or useful in the operation thereof. Pending receipt of operations orders placed in the mail today you should continue to manage and operate or resume operation, if possible, in the usual manner. Operations orders will contain further directions. Ellis T. Longenecker has been appointed Federal manager in charge of operation of systems taken over. On behalf of the Government and the Armed Forces I bespeak the full and hearty cooperation of both management and labor in the continuance or resumption of transportation service to sorely needed at this time to avoid imperiling and earlier conclusion of this war."

J. M. Johnson, Director of the Office of Defense Transportation.

14

Also, on the same date, August 11, 1944, the Director of the Office of Defense Transportation issued and sent to petitioner a "Notice and Order Establishing Federal Possession and Contral and Appointing a Federal Manager," which read as follows:

"Notice and Order Establishing Federal Possession and Control and Appointing a Federal Manager.

"To each of the motor carriers named in an Executive Order of the President of the United States concerning the possession and operation of certain motor carrier transportation systems:

[fol. 26] "1. You are hereby notified that, by order of the President of the United States (copy of Executive Order attached, possession and control of your motor carrier transportation system, including all real and personal property and other assets, wherever situated, used or useful in connection with the operation of such a system, are hereby taken and assumed by me as Director of the Office of Defense Transportation as of 12:01 A.M. on the twelfth day of August, 1944. Possession and control is not taken of any of your property, facilities, or other assets, which are not used or useful in the operation of your transportation system.

"2. The purpose of possession, control and operation of motor carrier transportation systems and properties by the United States pursuant to said Executive Order is to assure the maintenance of an effective system of transportation for the movement of troops, materials of war, and supplies and food for the armed forces and the civilian population.

"3. Effective this date, Ellis T. Longenecker is hereby appointed Federal Manager of the motor carrier transportation systems and properties taken hereunder, with full authority, subject to my direction:

"(a) To possess, control, and operate, or arrange for the operation of, each of the systems and properties taken hereunder in such manner as may be necessary for the successful prosecution of the war and maintenance of essential civilian economy and to accomplish the purposes of the Executive Order through or with the aid of such public or private agencies, persons, or corporations as he may designate;

[fol. 27] "(b) Subject to the provisions of the Executive Order, to manage or operate or arrange for the management or operation of, said systems and properties under such terms and conditions of employment as he deems advisable and proper;

"(c) From time to time, to return to any of the motor carriers such real or personal property, or other assets of such carrier, as he determines to be unnecessary to the operation of its motor carrier transportation system; and,

"(d) To prticipate in joint action with other carriers pursuant to orders of the Office of Defense Transportation.

"4. A copy of this Notice and Order shall be posted by each carrier in the principal place of business or headquarters of its transportation system and in each terminal maintained in connection with its operation.

"Issued at Washington, D. C., this Eleventh Day of August, 1944.

/s/ J. M. Johnson, Director of the Office of Deefnse Transportation".

15

Ellis T. Longenecker, who was appointed by the Notice and Order above set out, as Federal Manager of the motor carrier transportation systems and properties, assumed his duties as such manager on August 11, 1944.

[fol. 28] 16

On August 11, 1944, Ellis T. Longenecker, as Federal Manager of motor carrier systems and properties, issued a written order entitled "Operations Order No. 1," which Order read as follows:

"Federal Manager of Motor Carrier Transportation Systems and Properties

Possession Control and Operation of Motor Carriers Operations Order No. 1

To each of the motor carriers named in an Executive Order of the President of the United States concerning the possession and operation of certain motor carrier transportation systems:

1. Until further order, you are hereby directed to resume or continue the operation of your motor carrier transportation system in the usual and ordinary manner and course of business, as a going enterprise, in your present corporate, partnership, individual, or trade name, as the case may be, and by means of the instrumentalities, agents, officers, and employees customarily employed by you, as fully as

if possession and control had not been taken and assumed by the United States, subject, however, to the terms of said Executive Order and to all general and special orders, rules, regulations, and directions, which may be issued thereunder. Title to the properties and other assets of which possession has been taken remains in the owners thereof. Possession by the United States is not exclusive, and the United States asserts, and will assert, only such [fol. 29] control over the properties in its limited possession as may be necessary to accomplish the purposes of operation and of said Executive Order.

2. Each motor carrier shall forthwith indicate its acceptance or rejection of the directions contained in section 1 of this Operations Order No. 1. Such acceptance or rejection shall be in writing, signed by the owner or duly authorized agent, and shall be addressed to the Federal Manager. Such acceptance or rejection by a corporate motor carrier shall be accompanied by a certified copy of a resolution adopted by its board of directors, or other governing body, accepting or rejecting the directions contained in said section 1.

3. All personnel, officers, agents and employees, employed by you in the operation of the said system, are called upon to resume or continue the performance of their usual duties and in the customary manner until otherwise ordered. No such officer, agent, or employee shall be deemed to be an official or employee of the United States.

4. Subject to the terms of said Executive Order, and except as hereinafter provided, wage scales and working conditions in effect on the effective date of this order shall be maintained, and full recognition shall be given to the rights of the employees and all classes thereof. Each carrier shall observe the terms and conditions of the directive order of the National War Labor Board dated February 7, 1944, provided that wage increases provided for by the said directive order of the National War Labor Board, which accrued prior to the taking possession of its motor [fol. 30] carrier transportation system pursuant to said Executive Order, shall be paid only out of the net operating revenue of said system. If, at the expiration of ninety (90) days from the date of this Operations Order No. 1, it appears that the net operating revenue of the motor carrier

transportation system of any carrier, possession of which is so taken, is, or will be, insufficient to pay the said accrued wage increases provided for by the said directive order of the Nationl War Labor Board, such carrier shall make a report to the Federal Manager with respect thereto. Nothing in this order shall be construed so as to prevent or preclude any carrier from paying said accrued wage increases out of any other funds or assets available to it which are not necessary for the operation of its transportation system.

5. All deductions for the benefit of employees now being made by law or agreement, including insurance payments, Social Security and Unemployment Compensation deductions, and other deductions of every kind, and all arrangement governing the payment of wages, including war bond purchase plans, shall be continued, subject to any legal right of discontinuance.

6. Each motor carrier shall maintain its books and records in such manner that all transactions occuring after 12:01 A.M. of August 12, 1944, and during the period its system and properties are in the possession of the United States, shall be separate, or may be readily separated, from previous transactions. Customary accounting procedures may be followed, and the records and books of account currently in use may be used so long as all transactions may [fol. 31] be separated as provided in this section. Each motor carrier shall make such reports as the Federal Manager may, from time to time, request.

7. The operation of any motor carrier transportation system hereunder shall be in conformity with the Interstate Commerce Act, as amended, and other applicable existing Federal and State laws, executive orders, and local ordinances, and rules and regulations issued pursuant to such laws, executive orders, or ordinances. Each motor carrier shall be deemed to remain subject to suit in the same manner and to the same extent as it was so subject prior to the possession of its system and properties by the United States. However, except with the prior written consent of the Director of the Office of Defense Transporttion, no attachment by mesne process, garnishment, execution, or otherwise shall be levied on or against any of the real or personal property or other assets, tangible or intangible,

in the possession of the United States under said Executive Order. No motor carrier shall authorize or bring suit, accept service, or enter any legal proceedings, on behalf of the United States, the Director of the Office of Defense Transporttion, or the Federal Manager. Information as to the pendency, necessity, or probability of any legal proceeding which in any manner questions any right of the United States, the said Director or Federal Manager, shall be promptly furnished to the Federal Manager. Criminal laws protecting properties of the United States shall be deemed applicable to the system and properties of any motor carrier in the possession of the United States under the Executive Order.

[fol. 32] 8. If any regulation, order, direction, or instruction issued by the Federal Manager, or by any of his representatives, interferes with the accomplishment of the purpose for which possession and control are taken hereunder, the management of any motor carrier affected thereby, shall promptly notify the Federal Manager and request a waiver or modification of such regulation, order, direction, or instruction.

9. Except and to the extent that a motor carrier objects to any action that it is required to take, pursuant to this or any other order, rule, regulation, or direction, of the Federal Manager, or of any of his representatives, pertaining to possession, control, and operation, under said Executive Order, such action and the consequences thereof shall be the sole responsibility of the motor carrier. Failure to object to any such required action in the ammner provided in section 10 hereof shall be deemed to be a waiver of the right of the motor carrier to assert any claim for liability against the United States or its officers or agents with respect to damage allegedly resulting from any specific action so taken by it.

10. (a) Any motor carrier which objects to assuming sole responsibility with respect to action which it is required to take pursuant to this or any other order, rule, regulation, or direction, issued by the Federal Manager, or by any of his representatives, pertaining to possession, control, and operation, under the said Executive Order, shall protest such order, rule, regulation, or direction, to

the Federal Manager, in writing, and in such protest shall specify:

(i) The particular order, rule, regulation, or direction, which the motor carrier protests;

[fol. 33] (ii) The action to be taken which, it is asserted, is required by such order, rule, regulation, or direction, which action would not otherwise be taken, and which action if taken, it is claimed, will result in damage to the motor carrier;

(iii) The extent to which the motor carrier asserts such order, rule, regulation, or direction, will result in damage to it if complied with;

(iv) The nature of the damage which the motor carrier asserts it will suffer as a result of compliance with such order, rule, regulation, or direction and an estimate of the amount of such asserted threatened damage.

(b) Each such protest shall be made to the Federal Manager by registered mail or telegram within five (5) days after the issuance of the particular order, rule, regulation, or direction, so protested.

11. Upon the protest by a motor carrier of any order, rule, regulation, or direction as provided in section 9 hereof, the effectiveness of the order, rule, regulation, or direction shall be suspended as to the protesting motor carrier pending further consideration and direction by the Federal Manager and such motor carrier shall not take any action to carry into effect such order, rule, regulation, or direction until further directed so to do by the Federal Manager. The Federal Manager may thereafter direct that the protested order, rule, regulation, or direction shall be forthwith placed into effect with such modification thereof, if any, as to the protesting carrier or others as he may deem necessary or desirable.

[fol. 34] 12. Unless otherwise specifically directed, all communications concerning possession, control, and operation, under this Order shall be addressed to the Federal Manager, Metropolitan Life Building, Third Street and Second Avenue, Minneapolis, Minnesota.

13. A copy of this Operations Order No. 1 shall be posted by each carrier in the principal place of business or

headquarters of its transportation system and in each terminal maintained in connection with its operations.

Issued at Washington, D. C., this 11th day of August, 1944.

/s/ Ellis T. Longenecker, Federal Manager of Motor Carrier Transportation Systems and Properties."

17

A copy of the Executive Order described in Finding No. 12, and copy of the Notice and Order Establishing Federal Possession and Control and Appointing a Federal Manager, described in Finding No. 14, and also copy of Operations Order No. 1, described in Finding No. 16, were received by petitioner on or shortly after August 11, 1944.

18

The Director of the Office of Defense Transportation carried out all the terms of Executive Order No. 9462 as directed; and the Federal Manager proceeded to put into [fol. 35] effect the directions to him contained in the Notice and Order Establishing Federal Possession and Control and Appointing a Federal Manager.

19

On August 12 and 13, 1944, a meeting of the midwest operators was called by the Secretary-Manager of the Midwest Operators Association. This meeting was held at Minneapolis, Minnesota, and was attended by Ellis T. Longenecker, Federal Manager; Lloyd P. Davis, Operating Manager under Mr. Longenecker; Clair M. Roddewig, General Counsel of the Office of Defense Transportation, representing the United States, and by representatives of midwest motor carriers named in the Executive Order, including the petitioner.

At this meeting the representatives of the United States distributed copies of Executive Order No. 9462, the Order Establishing Federal Possession and Control and Appointing a Federal Manager, and Operations Order No. 1, to the representatives of the carriers attending the meeting and these orders were read and discussed by Mr. Longe-

necker and Mr. Roddewig with the representatives in the meeting. Mr. Longenecker and Mr. Roddewig advised the carriers, including petitioner, that the operation of their motor transportation systems was essential; and that the objectives of the Government were, (1) to assure a prompt resumption of the transportation facilities of the carriers involved, (2) to interefere with the management of these carriers as little as possible in accomplishing a resumption of the service, and (3) to accomplish these objectives as economically as possible.

[fol. 36] Mr. Longenecker advised the motor carriers in the course of the meeting that these orders meant what they said and that the carriers could not dispose of their property or in any manner mortgage it without the approval of Mr. Longenecker. Mr. Longenecker urged the representatives of the motor carriers, including the petitioner, to return to their offices and to immediately arrange for a resumption of their motor carrier operations and to utilize their present personnel in the operation of their motor carrier transportation systems insofar as possible.

Mr. Longenecker advised the operators at the meeting that their properties were going to be operated and that if the people who owned and managed the properties did not see fit to operate them, that Mr. Longenecker, as Federal Manager, would place his own representatives on the properties to see that they were operated.

The provisions of Operations Order No. 1 were carefully explained to the carriers present at the meeting and by the second day of the meeting the discussion had reduced itself to the proposition that Mr. Longenecker and Mr. Roddewig wanted the carriers to accept Operations Order No. 1, subject to the right of the carriers to protest and object to any of the provisions of said Operations Order No. 1. The carriers did agree to resume operation of their motor carrier transportation systems subject to their right to file written protests and objections to the provisions of Operations Order No. 1.

[fol. 37] 20

During the period August 12, 1944 to the date of termination of control, the Federal Manager maintainer super-

vision and ultimate control over the operations of petitioner's transportation system.

21

Within a short time after the issuance of Operations Order No. 1 and within the time allowed thereby for filing protest, petitioner filed with the Federal Manager a document in which it accepted section 1 of Operations Order No. 1 to the effect that petitioner should resume operations, but sought to reserve its right to any compensation to which it might be entitled and specifically protested the assumption by it of sole responsibility, financial or otherwise, for loss or damage arising out of any action it might be required to take.

22

On or about August 15, 1944, the Federal Manager issued a notice and directed that each carrier, including petitioner, post it in the principal place of business or headquarters of its transportation system. This notice stated "At 12:01 A.M. on August 12, 1944, possession of the properties of this transportation system was taken by the United States under authority of the President's Executive Order dated August 11, 1944, and Notice and Order of the Director of the Office of Defense Transportation of the same date." The notice further called attention to the provisions of section 6 of the War Labor Disputes Act to the [fol. 38] effect that any interference with the operation of any facility in the possession of the United States would constitute a criminal offense. Copies of said notice were posted as directed.

23

During the period referred to above, members of the Federal Manager's staff made calls at petitioner's offices to observe petitioner's compliance with the orders and directives of the Federal Manager, and to submit suggestions and recommendations. Also during this period, petitioner received orders and notices from the respondent relating, in general, to the operation of petitioner's motor carrier transportation system.

24

The respondent fixed the amount of wages to be paid employees, specifically by ordering that over-the-road drivers be paid the wage increase prescribed by the National War Labor Board on February 7, 1944. This order was put into effect.

25

On August 16, 1944, the Federal Manager, by "Accounting Circular No. 1" prescribed certain accounting methods and procedures which were put into effect by the Operating Manager. Among other things, this "Circular" called for certain inventories to be made as of 12:01 A.M., August 12, 1944. It also provided, "Transactions recorded in the books of original entry subsequent to 12:01 A.M., August 12, [fol. 39] 1944, shall clearly indicate the portion, if any, applicable to the period prior thereto." Another provision was: "The present ledger accounts shall be maintained solely for the purpose of posting entries applicable to the period prior to 12:01 A.M., August 12, 1944. New ledger accounts shall be opened for the purpose of entering the transactions applicable to the period subsequent thereto."

26

The Federal Manager assumed control of rates and the publication thereof, in one instance ordering the publication by the Midwest Motor Freight Tariff Bureau of a new minimum charge rule, such minimum charge rule being subsequently placed into effect. In October of 1944, the Federal Manager issued an order to the petitioner that no independent rate action should be taken without the prior written approval of the Federal Manager's office.

27

Possession and control of petitioner's transportation system and property by the United States continued until September 28, 1945. By an order dated September 27, 1945, the Director of the Office of Defense Transportation determined that it was practical to terminate possession, operation and control of petitioner's transportation system,

and ordered that such possession, operation and control of petitioner's system and property be terminated and relinquished as of 12:01 A.M., September 28, 1945.

[fol. 40] 28

During the war period and specifically on August 11, 1944, there was a critical shortage of motor vehicles of all types. There was a need for such vehicles for the hauling of industrial products and agricultural commodities and for military use. There was a sharp demand for vehicles of the type owned by petitioner; petitioner's vehicles were suitable for leasing; and there existed on August 11, 1944, a rental market for each and every piece of petitioner's vehicular equipment. This rental market was in no way affected by the strike of over-the-road drivers.

29

The property owned or possessed by petitioner, and used by it in its transportation business on August 11, 1944, included certain improved real estate, and the following personal property, which was in serviceable condition: 5 passenger or service vehicles, 55 tractor-trailer combinations, 14 spare tractors, 23 pick-up and delivery trucks, and office furniture and equipment.

30

On August 11, 1944 and during the period thereafter until June 16, 1945, a reasonable net rental value for petitioner's tractor-trailer combinations used in intercity service, determined upon the basis of the owner's furnishing only the vehicles and bearing none of the operating expense, was 5¢ per mile for the use of such combinations. This rate includes 3½¢ per mile for the tractor, and 1½¢ per mile for the trailer.

[fol. 41] 31

All of petitioner's tractor-trailer combinations and extra tractors could have been leased out on and after August 11, 1944, for a minimum use of 5,000 miles per month per vehicle.

32

The total market net rental value for petitioner's 55 tractor-trailer combinations for the period between August 11, 1944, and June 16, 1945, was $139,333.00.

33

The total market net rental value for petitioner's 14 extra tractors for the period between August 11, 1944, and June 16, 1945, was $24,826.66.

34

The market net rental value for each of petitioner's pick-up and delivery trucks on and after August 11, 1944, was $4.00 per day.

35

The total market net rental value for petitioner's 23 pick-up and delivery trucks for the period between August 11, 1944, and June 16, 1945, was $21,380.00.

36

The market net rental value of each of petitioner's passenger or service vehicles on and after August 11, 1944, was $30.00 per month.

[fol. 42]

37

The total market net rental value of petitioner's 5 passenger or service vehicles for the period between August 11, 1944, and June 16, 1945, was $1,520.00.

38

Among other property owned by petitioner on August 11, 1944, was certain office furniture and equipment, the cost of which was $13,081.30.

39

The market net rental value of such office equipment on and after August 11, 1944, was 4% of the cost of such equipment per month.

40

The total market net rental value of such office equipment for the period between August 11, 1944, and June 16, 1945, was $5,302.26.

41

During the period between August 11, 1944, and June 16, 1945, the operation of petitioner's transportation system resulted in an operating profit of $7,315.08. This sum was allowed to remain with petitioner's assets upon termination of Government Control.

Upon the foregoing Findings of Fact, the Commission makes the following:

[fol. 43] CONCLUSIONS

1

The Commission has jurisdiction over the petitioner's claim and over the parties to this proceeding.

2

As of 12:01 A.M. on August 12, 1944, the petitioner's transportation system and all its property used or useful in the operation of such system were taken for public use by the respondent, the United States, and were thereafter possessed, controlled and used by the respondent until 12:01 A.M., June 16, 1945.

3

The taking and use of petitioner's transportation system and properties require the payment of just compensation to petitioner by respondent under the terms of the Fifth Amendment to the Constitution of the United States.

4

As a part of just compensation the respondent, the United States, is indebted to petitioner, Gillette Motor Transport, Inc., in the following amounts as rental for the use of petitioner's properties during the period between August 11, 1944 and June 16, 1945:

For 55 tractor-trailer combinations	$139,333.00
For 14 spare tractors	24,826.66
For 23 pick-up and delivery trucks	24,380.00
For 5 passenger or service vehicles	1,520.00
Office furniture and equipment	5,302.26
Total	$195,361.92

[fol. 44]

5

As against said amount due to petitioner, the United States is entitled to a credit in the amount of $7,315.08.

6

The United States is therefore indebted to Gillette Motor Transport, Inc. in the net amount of $188,046.84.

7

The United States is further indebted to Gillette Motor Transport, Inc. in a sum equivalent to interest at 4% per annum on the sum of $188,046.84 from June 16, 1945 to date of payment, said sum also being a part of just compensation.

REASONS FOR FINDINGS AND CONCLUSIONS

The foregoing findings and conclusions have been adopted by a majority of the Commission, and the following reasons are concurred in by Chairman O'Hara and Commissioner Smith:

The petitioner, Gillette Motor Transport, Inc., a motor vehicle common carrier, filed its claim with this Commission under the provisions of the Act creating the Commission (Pacific Law 880, 80th Congress, 62 Stat. 1222, as amended) and seeks compensation for the alleged taking of its property for public use during the period between August 11, 1944 and June 16, 1945. Petitioner alleges that such taking was done in pursuance of Executive Order 9462 (C.F.R. 1944 Supp., p. 70).

[fol. 45] I. The Question of Taking

Petitioner, along with other midwestern motor carriers, was for some time prior to August 1944 involved in wage disputes with the union representing over-the-road drivers. Certain wage increases had been directed by the War Labor Board but petitioner and other carriers had taken the position that they were financially unable to pay the increased wages and consequently had not complied with the terms of this directive. On August 4, 1944, the drivers struck. On August 11, 1944, the President of the United States

signed and issued Executive Order 9462, by which order he directed the Director of the Office of Defense Transportation "to take possession and assume control of, and to operate, or arrange for the operation of the motor carrier transportation systems of the motor carriers named in the list attached hereto and made a part hereof, including all real and personal property and other assets, wherever situated, used or useful in connection with the operation of such systems, in such manner as he may deem necessary for the successful prosecution of the war; and to do anything that he may deem necessary to carry out the provisions and purposes of this order." The Executive Order provided that during his operation of said transportation systems the Director should observe the terms and conditions of the Directive Order of the National War Labor Board, dated February 7, 1944. The Executive Order also contained the following provisions: "3. Except with the prior written consent of the Director, no attachment by mesne process, garnishment, execution or otherwise shall be levied on or against any of the real or personal property or other assets, tangible or intangible, in the possession of the Director hereunder."

[fol. 46] On the same date, August 11, 1944, the Director of the Office of Defense Transportation sent to petitioner a telegram advising that he, the Director, had issued an order taking possession and control as of 12:01 A.M. on August 12, 1944, of petitioner's motor carrier transportation system and all property used or useful in the operation thereof.

On the same date, August 11, 1944, the Director of the Office of Defense Transportation issued a "Notice and Order Establishing Federal Possession and Control," this order providing in part: "1. You are hereby notified that, by order of the President of the United States (copy of Executive Order attached) possession and control of your motor carrier transportation system, including all real and personal property and other assets, wherever situated, used or useful in connection with the operation of such system, are hereby taken and assumed by me as Director of the Office of Defense Transportation as of 12:01 o'clock A.M. on the twelfth day of August, 1944." By this order the Director also appointed a Federal Manager to possess,

control and operate or arrange for the operation of the systems and properties of petitioner and the other carriers named in the Executive Order.

On the same date, August 11, 1944, the Federal Manager issued "Operations Order No. 1," which provided in part: "1. Until further order, you are hereby directed to resume or continue the operation of your motor carrier transportation system in the usual and ordinary manner and course of business, as a going enterprise, in your present corporate, partnership, individual, or trade name, [fol. 47] as the case may be, and by means of the instrumentalities, agents, officers, and employees customarily employed by you, as fully as if possession and control had not been taken and assumed by the United States, subject, however, to the terms of said Executive Order and to all general orders, rules, regulations, and directions, which may be issued thereunder." This order also directed compliance with the terms and conditions of the Directive Order of the National War Labor Board, dated February 7, 1944.

It is our opinion that the issuance and service of the above orders and notices constituted a taking by the Government of petitioner's property. The language of the Executive Order is perfectly clear as to the purpose of the Government in taking the action, and its intention that possession and control be taken outright.

The Executive Order itself even provided for some details of the possession and control to be exercised. It ordered compliance with the National War Labor Board Directive, and forbade the levy of any attachment by mesne process or otherwise on or against any of the property taken.

The telegram sent to plaintiff and the Notice and Order of Possession by their terms leave no doubt whatever as to what was being done. Nothing could be clearer than the statement that "possession and control of your motor carrier transportation system, including all real and personal property and other assets wherever situated, used or useful in connection with the operation of such system are hereby taken and assumed by me as Director of the Office of Defense Transportation."

[fol. 48] The Federal Manager, having been appointed

by the above Order, issued his Operations Order No. 1. The terms of this order do not admit any question that the possession and control taken and assumed by the Director of the Office of Defense Transportation had been in turn assumed by him, the Federal Manager, acting in behalf of the United States.

Acts done thereafter by the Federal Manager, with reference to the property of the petitioner, not only were consistent with the express terms of the several orders and notices mentioned above, but were not consistent with any other interpretation. He, the Federal Manager, caused notices to be posted on petitioner's terminal buildings indicating that the United States had taken possession of petitioner's properties; had various Government employees call at petitioner's office from time to time to observe compliance with his orders; fixed the amount of wages to be paid; prescribed accounting methods and procedures, ordering the separating of entries as to transactions before and after 12:01 A.M., August 12, 1944; assumed control of rates and the publication thereof.

The Government says that such "interference" as petitioner may have encountered from Government action did not amount to a taking of its property but merely to regulation. To place any such construction on the acts done by the Federal Manager would be to belie the statements contained in the Executive Order and the orders issued thereunder. The Federal Manager could not alter the intention expressed by the President, and could not lessen the effect of the President's Order and the act of [fol. 49] the Director of the Office of Defense Transportation in taking possession and control under that Order. Possession and control having been once taken, all things done by the Federal Manager were done by him as the representative of the United States charged with maintaining for the United States its possession and control.

In the United States v. United Mine Workers of America, 330 U.S. 258, the Court said at page 288, "The Defendants, however point to the fact that the private managers of the mines have been retained by the Government in the role of operating managers with substantially the same functions and authority. It is true that the regulations for the operation of the mines issued by the Coal

Mines Administrator provide for the retention of the private managers to assist in the realization of the objects of Government seizure and operation. The regulations, however, also provide for the removal of such operating managers at the discretion of the Coal Mines Administrator. Thus the Government, though utilizing the services of the private managers, has nevertheless retained ultimate control.

"The defendants also point to the regulations which provide that none of the earnings or liabilities resulting from the operation of the mines, while under seizure, are for the account or at the risk or expense of the Government; that the companies continue to be liable for all Federal, State, and local taxes; and that the mining companies remain subject to suit. The regulations on which defendants rely represent an attempt on the part of the Coal Mines Administrator to define the respective powers and obligations of the Government and private operators dur-[fol. 50] ing the period of Government control. We do not at this time express any opinion as to the validity of these regulations. It is sufficient to state that, in any event, the matters to which they refer have little persuasive weight in determining the nature of the relation existing between the Government and the mine workers."

Justice Black stated with reference to that case at page 329, "The fact that it utilized the managerial forces of the private owners does not detract from the Government's complete authority. For whatever control Government agents delegated to the private managers, those agents had full power to take away and exercise themselves."

The situation described by the Court in the Mine Workers case is substantially the same as existed in the case before us.

In the case of United States v. Pewee Coal Company, 341 U.S. 114, it was unanimously held by the Supreme Court that circumstances similar to these constituted a taking. (The differences among the three opinions in that case were on the question of compensation.)

Were there any question as to the "public use" to which petitioner's property was placed, there is certainly no doubt that petitioner was deprived of its own free use

of its property. As the Court said in United States v. General Motors Corporation, 323 U.S. 373, at page 378, "The Courts have held that the deprivation of the former owner rather than the accretion of a right or interest to [fol. 51] the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

When possession was taken, the status then remained fixed until something occurred to restore the property to petitioner. The only way in which the Director of the Office of Defense Transportation could have altered the situation was by terminating the possession, control and operation of petitioner's transportation system or any part thereof, or any real or personal property when he determined that such possession, control and operation were no longer necessary for the successful prosecution of the war. This authority was given to the Director by the terms of the Executive Order. But the Director did not so terminate the possession or control of any of petitioner's property until the effective date of his formal notice and order of termination.

The Federal Manager was not authorized to terminate possession and control, but could return to petitioner individual items of its property which he (the Federal Manager) might have determined to be unnecessary to the operation of petitioner's motor carrier transportation system. There was no such return of petitioner's property.

Possession and control of petitioner's property continued from August 11, 1944, until the date on which such possession and control were terminated and relinquished, as shown by the notice and order of termination issued by [fol. 52] the Director of the Office of Defense Transportation. The Government's possession and control during this period was uninterrupted and there was no relaxation or release of such control during said period.

II. What Was Taken

The respondent contends that, if anything was taken, the taking was of something far short of possession, occupancy, use, enjoyment, and managerial discretion."

In our opinion, however, the Executive Order and the Notice and Order of Possession and Control leave no room for doubt as to what the Government took. Both documents call for the taking of possession and assumption of control of petitioner's motor carrier transportation system, "including all real and personal property and other assets, wherever situated, used or useful in connection with the operation of such system." The telegram reads, "* * * and all property. * * *"

We therefore conclude that as of 12:01 A.M., August 12, 1944, the Government took possession and control of all of petitioner's property, including each and every item used or useful in connection with the operation of its transportation system.

The fact that the Government chose to use petitioner's property in the same business as was previously conducted by petitioner does not in any way alter the effect of the act of taking. If the Government had decided to close petitioner's offices and place its vehicles in storage, there [fol. 53] would have been no less of a taking, nor would the petitioner's right to compensation have been impaired or diminished. We are concerned with what petitioner was deprived of. We find that petitioner was deprived of its property and of the right to determine what use should be made of it. We cannot presume from the Government's use of the property that petitioner could only have carried on the same business.

III. Compensation

To fix the "just compensation" to which petitioner is entitled for the taking of its properties, we undertake to determine the value of the property on the date of the taking, August 11, 1944. This is to be determined as fair market value, based not upon what the Government gained by the taking and use of the property, but rather upon what the petitioner lost in this property. United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53; Boston Chamber of Commerce v. City of Boston, 217 U.S. 189.

A. Rental

In a case of taking for temporary use the normal measure of just compensation is the fair rental value of the property

so taken and used. United States v. General Motors Corporation, supra; United States v. Petty Motor Co., 327 U.S. 372; Kimball Laundry Co. v. United States, 338 U.S. 1.

We find no reason to depart from the rental measure in this case. As pointed out above, petitioner was deprived of its property and the right to determine the use to which [fol. 54] it should be put. Consideration should be given to uses to which property is adaptable and can reasonably be expected to be needed. Mississippi and Rum River Boom Co. v. Patterson, 98 U.S. 403. Unquestionably, one use which was available to petitioner was to rent out its property; there was a demand, and the property was suitable for this use. The right and opportunity to devote the property to such use were taken away; thus the rental value represents petitioner's pecuniary loss.

The respondent, in its brief, states that in the case of United States v. Pewee Coal Co. (supra), "A majority of the United States Supreme Court . . . at least questioned whether, in this type of taking . . . that (the award) should ever be based on an artificial 'rental value standard.'" We do not so understand that decision. Mr. Justice Black, in the opinion in which three other Justices joined, referring to the "reasonable value of the property's use." noted that Pewee "neither claimed such compensation nor proved the amount." In the dissenting opinion of Mr. Justice Burton (with whom three other Justices concurred) it is stated: "Here there is no showing by the company of any rental value due it as compensation for the Government's possession of its properties." It may well be that Pewee's election not to claim rental value was due to the inherent nature of coal mine property, which did not as readily lend itself to being rented out as would vehicles which could be used for transporting goods wherever the highways lead. But whatever the reason for Pewee's claim, it seems to us that the Court has still recognized "value of the property's use" as the normal measure of compensation.

[fol. 55] The market price of the property taken is just compensation. The market value in the case of the taking of the fee is the sum which probably would be arrived at as a result of fair negotiations by an owner willing to sell and a purchaser willing to buy, after due consideration

of all elements reasonably affecting value, Olson v. United States, 292 U.S. 246. As applied to the taking of temporary use of property, the market value is the sum which probably would be arrived at in the same manner by a willing lessor and a willing lessee, Kimball Laundry Co. v. United States, supra.

The respondent contends that, if rental value were to be used as the measure of compensation, it should be the rental value of a motor common carrier business as a going concern. But it is to be borne in mind that upon the Government's taking on August 11, 1944, petitioner's property was not then being used in the common carrier business, and petitioner had no obligation to again devote it to that use. Respondent points out the lack of a rental market for a going common carrier business; this seems to us to make it even clearer that what petitioner lost was access to the rental market for the component parts of its entire property.

Certain evidence was introduced which purported to show: (1) "fair return on net assets;" (2) operating ratios; and (3) comparative operating experience—i.e., a comparison between the operating profits or losses of petitioner's transportation system in periods prior to August 11, 1944, and the profit or loss during Government operation and control. Without determining the exact probative [fol. 56] force of the evidence on these subjects, we have decided that such evidence does not indicate the compensation to which petitioner is entitled, and is not material to the issues of the case.

We are satisfied that, at the time of the seizure of petitioner's property, there existed a demand and a rental market for all of petitioner's vehicular equipment and office equipment.

There was a wide range of testimony as to rental value of tractors and trailers. After consideration of all of the evidence on this subject, we have determined that the fair net rental value of a tractor-trailer combination at the time of Government seizure was 5¢ per mile, which includes 3-12¢ per mile for the tractor and 1-½¢ per mile for the trailer. This rental rate was available on the open market as a net rental per mile, after allowance for depreciation and all other operating expenses.

Consideration of all of the evidence brings us to a finding that all of petitioner's tractor-trailer combinations and extra trailers could have been rented out for a minimum of 5,000 miles per month per vehicle, so the total amount of the fair net market rental value for petitioner's tractors and trailers is computed as shown in the findings.

From all of the evidence in the case bearing on the subject, we find that the market net rental value of each of petitioner's pick-up and delivery trucks on and after August 11, 1944 was $4.00 per day. This daily rate is multiplied by the number of days of Government control (excluding Sundays) to arrive at the total for this item.

[fol. 57] The reasonable net rental value on a monthly basis for petitioner's passenger and service vehicles and for its office equipment was the subject of stipulations of the fact between the parties in the case. Our findings on these items are mere mathematical computations. A formula for computing rental of land and improvements was also the subject of a stipulation. However, an essential element for application of this formula, to wit, the date of acquisition or construction cannot be determined from the evidence.

With regard to rental rates and particularly the matter of tractor-trailer rentals, the respondent has insisted that certain regulations of the Office of Price Administration had the effect of limiting the amount which could have been charged. We recognize the existence at the time in question of maximum price regulations, but cannot take notice, without proof, of matters which are not included in the regulations themselves. The regulations in question did not establish "dollar and cent" ceilings and the evidence does not establish that petitioner would have been subject to any fixed ceiling below the rental rate which we have determined to have been the fair market rate.

B. Credits

During the Government's possession and control of petitioner's property and its operation of petitioner's transportation system, there was an operating profit of $7,315.08. During this period the operation of the business and system was the Government's own operation. The Government was therefore entitled to any profits derived therefrom.

[fol. 58] As was pointed out in one of the petitioner's briefs, this profit must have been contained somewhere in the returned properties and the returned properties were thus augmented by the amount of the profit. We therefore allow a credit to the Government in the amount of $7,315.08.

C. Interest

An additional sum is computed in the manner of interest, not to be paid as interest, but as a part of the total compensation which would repay petitioner for its loss in the property taken. This additional sum is to make the total allowed compensate petitioner as fully as though payment had not been deferred. Phelps v. United States, 274 U.S. 341.

While the Supreme Court approved the disallowance of interest in the case of United States v. North American Trading C., 253 U.S. 330, it appears that the distinction there made was not based entirely on the plaintiff's delay in filing suit but also in the difference between the manner of taking in that case and in others. We have found no case in which a reversal was based upon allowance of interest by the lower Court.

The taking on August 11, 1944 was of the use of petitioner's property and the value of said use is computed as rental. The amount of such rental did not become fixed until there could be a determination of the length of the period of use. The compensation due for such use was not only undetermined but incapable of determination until the end of the period. Rental, if paid on June 18, 1945, would be presumed to have compensated petitioner for the [fol. 59] use of all of its property until that date. During the period of Government possession, petitioner had no use of any of its property and was not deprived of any greater interest in any of it by consumption or destruction until the time came for its return. Therefore, the additional sum computed in the manner of interest will be calculated from June 16, 1945 on the total net compensation hereinbefore determined.

Since the sole object is to compensate petitioner, the rate adopted is 4 per cent per annum, which is consistent with prevailing rates of interest during recent years. Arkansas Valley Railway v. United States, 107 Ct. Cl. 240.

CARPENTER, COMMISSIONER, DISSENTING:

The findings of the Commission in this case are by no means complete. In my opinion, based upon the record, the following findings of fact should be made in this case:

Findings of Fact

1

The evidence does not establish that the petitioner suffered any pecuniary loss due to any action on the part of the Government. On the contrary, the action taken by the Government enabled the petitioner to continue operation of its system and the profits earned during the period August 11, 1944 to June 16, 1945, were more than they would have been if the Government had taken no such action.

[fol. 60]

2

On August 12 and 13, 1944, pursuant to a notice issued by the Midwest Operators Association, a meeting was held at Minneapolis, Minnesota, and was attended by representatives of a large number of the motor carrier members of the association, including a representative of petitioner. It was also attended by Mr. Longenecker and by Mr. Roddewig, the general counsel of the Office of Defense Transportation.

3

At the meeting Mr. Roddewig read Executive Order No. 9462 and Mr. Longenecker read Operations Order No. 1. Mr. Longenecker stated that he hoped the existing managements would continue to operate the truck lines just as they had been doing.

4

Mr. Longenecker did not state at this meeting that the Government was taking physical possession of the transportation system of petitioner or their properties, or that the lines would be run for the account of the Government.

5

Mr. Longenecker and Mr. Roddewig stated at this meeting that they did not consider that the carriers would be

compensated, and that they had no authority to comm
the Government to pay compensation.

[fol. 61] 6

The Federal Manager exercised no affirmative contr
over operation of the transportation system of petitione
on the other hand, he and his representatives assisted pet
tioner in the resumption and continuation of its opera
tions in furtherance of the war effort.

7

The United States did not take physical possession o
control of the petitioner or any of its properties.

8

No representative of the United States occupied pet
tioner's offices or other property.

9

The Federal Manager did not inform petitioner that h
was acting as manager of its business or property an
did not appoint anyone as manager of petitioner.

10

The Federal Manager did not require that signs be place
on petitioner's trucks with respect to possession or tit
being in the United States.

11

The Federal Manager did not assert or claim that pet
tioner or its property was immune from State or loca
laws, licenses, regulations, or taxes.

[fol. 62] 12

The Federal Manager did not state to any officers or em
ployees of petitioner that they were acting as representa
tives of the United States.

13

Petitioner's officers and directors continued in office afte
August 11, 1944, and performed the same supervisory an

managerial functions they had previously performed. The Federal Manager made no attempt to displace or remove them.

14

The Federal Manager did not exercise any control over petitioner with respect to retaining, hiring or discharging its employees. He did not issue any instructions that they were Government employees or that they were exempt from State Social Security, unemployment compensation or workmen's compensation laws.

15

The Federal Manager did not attempt to exercise any control over petitioner's regular bank account, its cash or intangible assets, or its operation revenues or accounts receivable. Petitioner's revenues were not treated as being received for the account of the United States.

[fol. 63] 16

The Federal Manager did not issue any orders to petitioner with regard to the routes over which it operated, the kinds of traffic it carried, or what shippers it served.

17

The Federal Manager did not exercise any control over petitioner with respect to the purchase of equipment.

18

The Federal Manager did not advise the petitioner that a refusal on its part to follow any directive or recommendation of the Government would subject it to possible civil or criminal prosecution; no threats of this type were made at any time.

19

During the period of Governmental supervision, the Federal Manager did not interfere with petitioner's conduct of its labor negotiations, either individual or collective.

20

Accounting Circular No. 1 did not require petitioner to set up a new set of books or to maintain records which it

was not already maintaining, nor did it involve any additional expense to petitioner.

[fol. 64] 21

There is no evidence that the issuance of Executive Order No. 9462 or the actions of respondent taken pursuant thereto had any adverse effect on petitioner's credit standing.

22

On July 31, 1944, the total assets of petitioner, according to its own books and records, were $240,202.28 and on May 31, 1945, were $276,260.84.

23

On July 31, 1944, the net book cost of all operating property was $132,222.79, and on May 31, 1945, $162,051.77.

24

A comparison between amounts of total revenue of petitioner for the period of alleged Government control and the total revenue during corresponding periods in 1943 and 1944 shows, in regard to the common carrier regular service, that the revenue during the period of alleged control was greater than in the comparable period of 1943 and 1944.

25

During the period from July 31, 1944, to May 31, 1945, petitioner had according to its books and records a net profit of $11,093.70. This profit, as adjusted to the period August 11, 1944, to June 16, 1945, and after deducting non-operat-
[fol. 65] ing expenses (i.e., "Interest" and "Other Deduction"), is $11,239.67.

26

The net operating profit of $11,739.67 derived from the operation of petitioner's transportation system during the period from August 11, 1944, to June 16, 1945, was retained by the petitioner. In arriving at the net profit, depreciation on all tangible property, taxes, licenses, insurance, and all other expenses incident to the operation of

the system were deducted from the gross income received during the period.

27

The tables set out below reflect petitioner's total income, total expenses and net profits (before income taxes) for the periods indicated:

Period	Total Income	Total Expenses*	Net Profit
1940	$ 613,380.45	$ 607,613.58	$ 5,766.87
1941	836,381.44	789,367.73	47,013.71
1942	854,902.95	804,599.60	50,303.35
1943	1,092,573.93	1,044,848.75	47,725.18
1-1-44 to 7-31-44	654,730.85	653,338.64	1,392.21
8-1-44 to 5-31-45	968,144.30	960,975.19	7,169.11**

(Respondent's Exhibit No. 9)

*Includes interest expense.
**The majority opinion added $145.97 net profit, representing computed net profit for three-day period not covered in net profit shown above.

[fol. 66]

28

The operating ratio of petitioner for the period July 31, 1944, to May 31, 1945, was 98.9%. For the period January 1, 1944 to July 31, 1944, it was 99.3%.

29

A comparative study of operating ratios for the years 1941-1946 inclusive covering all common carriers of general commodities engaged in inter-city service in the United States, disclosed that these ratios were: 95.38% in 1946; 100.39% in 1945; 98.46% in 1944; 96.93% in 1943; 93.63% in 1942; and 94.62% in 1941.

30

A comparative study of operating ratios for the years 1941-1946 inclusive, covering all common carriers of general commodities engaged in inter-city services in The Northwest Region of The United States, disclosed that these ratios were: 98.70% in 1946; 100.03% in 1945; 98.54% in 1944; 96.63% in 1943; 94.55% in 1942; 95.88% in 1941.

31

On August 11, 1944, the vehicular equipment of petitioner was generally in a poor state of repair as a result of insufficient replacement and lack of proper maintenance.

[fol. 67]

32

During 1944 and 1945, motor carriers throughout the country experienced abnormally high repair expenses. There is no evidence that during the period of Governmental control petitioner's motor equipment experienced usage which necessitated greater expense than that experienced by other carriers not affected by Executive Order No. 9462.

33

Except for normal wear and tear, petitioner's motor equipment was in as good condition on June 16, 1945 as it was on August 11, 1944.

34

From August 11, 1944 to June 16, 1945, petitioner's office equipment and shop and garage equipment did not diminish in value except for normal wear and tear. No action by respondent during this period had any effect on the value of this equipment.

35

A fair and reasonable net return on petitioner's capital investment for the period from August 11, 1944 to June 16, 1945, is an annual return of 8 percent of its net assets (assets less liabilities) on July 31, 1944. This net return for the period of 308 days from August 11, 1944 to June 16, 1945, is $5,489.55, based on the annual return of 8 percent (i.e. $6,505.47) on net assets of $81,318.34 as shown on peti-
[fol. 68] tioner's books and records, including the stated value of operating rights.

36

A fair and reasonable net return for the petitioner's intangible property, not included in the net assets, for the period August 11, 1944 to June 16, 1945, is the excess of the average net operating profit for the four years prior to 1944 over the net annual return for the physical properties proposed according to finding No. 35. Petitioner's average net operating profit for these four years was $42,869.00 (1943, $54,319.21; 1942, $55,193.91; 1941, $51,371.38; 1940,

$10,591.51.) This sum of $42,869.00 is more than a reasonable annual return on investment (i.e. 8% of the net assets, or $6,505.47) as set out in finding No. 35 and, consequently, the fair and reasonable return attributable to such intangible property is $36,363.53 on an annual basis and $30,684.84 for 308 days. The return attributable to the petitioner's franchises is included herein.

37

A fair and reasonable rental for the motor carrier transportation system of petitioner, including all real and personal property and other assets, for the period August 1, 1944, to June 16, 1945, is $36,174.39, which comprises a fair and reasonable net return to petitioner for the physical and intangible assets proposed in findings numbers 35 and 36 above.

38

On August 11, 1944, the rental rates for all commercial motor vehicles were under the control of the Federal Gov- [fol. 69] ernment. Revised Maximum Price Regulation No. 165 of the Office of Price Administration, which was in effect on August 11, 1944, prescribed the maximum amount for which commercial motor vehicles could be rented.

39

The ceiling or maximum under Revised Maximum Price Regulation No. 165 of the Office of Price Administration, for which petitioner could have rented any of its tractor-trailer units on August 11, 1944, was an amount which would produce a net return to the petitioner, on the average, of two cents per mile for each tractor-trailer unit, after paying all expenses and after deducting depreciation.

40

The fair market rental value of the average tractor-trailor unit owned by petitioner would produce a net return of two cents per mile to the owner, after payment of all expenses of the owner in connection with the leasing thereof and after deducting depreciation on the vehicle, if rented on August 11, 1944, and during the period ending June 16, 1945.

41

If petitioner had leased out the tractor-trailer units owned by petitioner on August 11, 1944, they would have been used, on the average, 50,000 miles per year.

[fol. 70]

42

The total fair market rental value under OPA ceilings for the 62 tractor-trailer units owned by petitioner during the period of alleged Government control, a period of 308 days, was the produce of 2,615,890 miles and 2 cents per mile, being a total of $52,317.80.

43

Petitioner has not proved the maximum rental rate, under ceilings established by the Office of Price Administration, for trucks (other than tractor-trailer units) owned by petitioner that were used and usable in pick-up and delivery service and in intercity operation.

44

The fair market rental value of the office machines and furniture owned by petitioner was an amount that would have produced a net return of 4 percent per month of the cost thereof, after payment of the expenses of the lessor in connection with the leasing thereof and after deducting depreciation, if the said office machines and furniture had been rented or leased out on August 11, 1944, and during the period ending June 16, 1945. The cost to petitioner of such property was $13,081.30.

45

The fair market rental value of each of the automobiles owned by petitioner was an amount that would produce a [fol. 71] net return of $30.00 per month to the lessor, after payment of the expenses of the lessor in connection with the leasing thereof and after deducting depreciation, if the said automobiles had been rented or leased out on August 11, 1944, and during the period ending June 16, 1945.

46

Prior to August 11, 1944, the petitioner had been for many years a successful common carrier in the field of transportation by automotive vehicles. There is no reliable evidence indicating that on August 11, 1944, or prior to that date the officials of petitioner or of the carriers named in Executive Order No. 9462 considered or planned any reasonable reorganization of their respective companies inconsistent with an intention of continuing the corporation in the common carrier field.

Conclusions

I wholly disagree with all the majority's conclusions, save and except their conclusion No. 1. Based upon the evidence and the findings of fact, I would accordingly make the following conclusions in this case:

1

The Commission has jurisdiction over the petitioner's claim and over the parties to this proceeding.

2

There was no taking of the transportation system or property of petitioner within the meaning of the Fifth [fol. 72] Amendment. Whatever control was exercised over petitioner by the Federal Government, on and after August 11, 1944, was an exercise of the Government's regulatory powers.

3

If there were a taking of petitioner's transportation system or property by the respondent on August 11, 1944, it was a mere technical taking and petitioner is entitled only to the pecuniary loss suffered by the petitioner as a direct result of the taking. The petitioner did not prove the amount of such pecuniary loss or that it suffered any such loss as a result of the taking.

4

Even if there were a taking of possession of petitioner's transportation system and property (which respondent de-

nies), the petitioner has failed to prove any amount of just compensation in excess of the losses it would have sustained if the Government had taken no action whatever.

5

If there were a taking (which respondent denies), it was the petitioner's business as a going concern which was taken and not merely its equipment.

6

If there were a taking (which respondent denies), the proper measure of compensation is the fair and reasonable [fol. 73] rental value of the petitioner's business as a going concern.

7

If there were a taking (which respondent denies), the proper measure of compensation is not the fair and reasonable rental value of petitioner's separate items of equipment.

Opinion

The holding in this determination is based upon the opinion filed by the writer in the case of Hawkeye Motor Express, Inc. vs. The United States, decided by this Commission.

There was no evidence introduced in this case to sustain a Fifth Amendment taking by the Government of petitioner's truck line other than the promulgation of the Executive Order and ensuing orders, all of which were set out in the Hawkeye case.

There being nothing more, in my opinion, the same would not constitute such a taking as to entitle petitioner to compensation under the Fifth Amendment of the Constitution of the United States. The majority of the Commission has found otherwise and has held that petitioner is entitled to a fair market or rental value for the use of its property. In my opinion, even if there was a taking in this case, fair rental value is not the proper measure of compensation. The only compensation to which petitioner would be entitled would be extra losses over what

would have otherwise been sustained which were occasioned by the Government's operations. Such has not been established in this case.

The majority has found that the United States is indebted to the petitioner, Gillette Motor Transport, Inc., [fol. 74] as rental for the use of petitioner's properties from August 11, 1944 to June 16, 1945, a period of ten months and five days, the sum of $195,361.92, against which they give the Government credit for $7,315.08, leaving the net amount of $188,046.84 with interest at 4% per annum from June 16, 1945, to date of payment as the amount the United States will have to pay petitioner. Referring to finding No. 27 set out in this opinion, it will be noted that this award is greater than the total of the net profit earned by the petitioner for all the years 1940, 1941, 1942, 1943, 1-1-44 to 8-1-44 and 5-31-45, to 8-1-44, a period of almost 5½ years. Such an award to petitioner as rental for a period during which petitioner operated its own trucking company for its own benefit seems to me to amount to an unjust enrichment to petitioner at the expense of the Government.

In my opinion the judgment in this case should be in favor of the respondent.

Order

Let this determination be filed with the Clerk of the Commission. The Clerk is directed to give notice of the filing hereof to the parties by serving copy on attorneys of record, either personally or by mail.

Done at Kansas City, Missouri, this 31st day of March, 1952.

/s/ Thomas W. O'Hara, Chairman, Ernest M. Smith, Commissioner, Randolph Carpenter, Commissioner.

[fol. 75] I, Frances N. Heiman, Acting Clerk of the Motor Carrier Claims Commission, do hereby certify that the foregoing is a true and correct copy of Final Determination of the Commission in the case of Gillette Motor Transport, Inc., vs. The United States, Case No. 32, as same

was filed with me on the 31st day of March, 1952, and as appears of file in my office.

/s/ Frances N. Heiman, Acting Clerk of the Commission.

IN THE TAX COURT OF THE UNITED STATES

ANSWER—Filed Jul. 25, 1955.

Comes now the Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for answer to the petition filed in this proceeding, admits and denies as follows:

I and II

Admits the allegations contained in paragraphs I and II of the petition.

III

Admits that the deficiencies as determined by the Commissioner of Internal Revenue are for income taxes for the calendar years 1952 and 1953 in the respective amounts of $57,111.13 and $18,097.38, but denies the remaining allegations contained in paragraph III of the petition.

[fol. 76] IV

(A) and (B) Denies that respondent's determination is based upon errors as alleged in subparagraphs (A) and (B) of paragraph IV of the petition.

V

(A) Admits that on August 11, 1944, the United States of America, pursuant to Executive Order No. 9462 issued by the President of the United States in exercise of the powers granted by the Constitution of the United States, took possession of all the real and personal property and other assets of the taxpayer used or useful in connection with the operation of its motor carrier transportation system. Admits that in pursuance of a petition filed by the taxpayer with the Motor Carrier Claims Commission an order was entered by the Motor Carrier Claims Commission on March 31, 1952. Admits that subsequent there-

to and prior to December 31, 1952, the taxpayer received from the United States of America $157,843.99 in payment of the aforesaid award entered in its favor by the Motor Carrier Claims Commission. Admits that no part of the amount so received by this taxpayer is includible and taxable as part of its ordinary income for the calendar year 1953, but denies that no part of the amount so received by this taxpayer is includible and taxable as part of its ordinary income for the calendar year 1952, if such allegation was intended by the petitioner. For lack of information on which to form a positive belief, denies the remaining allegations contained in subparagraph (A) of paragraph V of the petition.

[fol. 77] (B) Denies the allegations contained in subparagraph (B) of paragraph V of the petition.

Denies generally and specifically each and every allegation contained in the petition not hereinbefore expressly admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner of Internal Revenue be approved.

/Signed/ John Potts Barnes, Chief Counsel, Internal Revenue Service.

Of Counsel: James L. Backstrom, Regional Counsel, Paul M. Newton, Special Attorney, Internal Revenue Service, Rm. 523, 1114 Commerce, Dallas, Texas.

PMN, ldb 7-19-55.

IN THE TAX COURT OF THE UNITED STATES

AMENDED PETITION—Filed Nov. 5, 1956

[Title omitted]

The above named petitioner hereby amends its petition herein to read as follows:

I

The petitioner is a corporation organized and existing under and by virtue of the laws of the State of Texas, with [fol. 78] principal offices in Dallas, Texas. The returns

for the period here involved were filed with the Director of Internal Revenue for the District of Texas on or before March 15, 1953 and March 15, 1954, respectively.

II

The Notice of Deficiency, a copy of which is attached hereto, marked Exhibit "A" and made a part hereof, was mailed to the petitioner on May 11, 1955.

III

The deficiencies as determined by the Commissioner of Internal Revenue are for income taxes for the calendar year 1952 and 1953 in the respective amounts of $57,111.13 and $18,097.38, of which the whole of each is in dispute.

IV

The determination of tax set forth in the Notice of Deficiency is based upon the following errors:

A. The Commissioner erroneously determined that the $157,843.99 which the petitioner received from the United States of America in payment of an award entered in its favor by the Motor Carrier Claims Commission of the United States by order dated March 31, 1952, was includible as ordinary income in the petitioner's taxable income for the calendar year 1952.

[fol. 79] B. Should it be ultimately held that the aforesaid amount received by petitioner during the calendar year 1952 is to any extent includible in the petitioner's taxable income for that year, then the Commissioner erroneously failed to determine that said award which the petitioner received during the calendar year 1952 was taxable to the petitioner, not as ordinary income but only as a gain arising out of the sale or exchange of a capital asset.

C. The Commissioner erroneously determined that the petitioner did not sustain an operating loss of $36,634.37 in 1952, and the Commissioner erroneously disallowed as an operating loss deduction in 1953 the $36,634.37 operating loss which the petitioner suffered in 1953.

D. In the alternative, and in the event that it is ultimately held that the petitioner suffered no operating loss for the calendar year 1952, then the Commissioner erroneously determined that the net operating loss in the amount of $23,506.35 which petitioner suffered during the calendar year 1955 was not a proper carryback to the year 1953 under conditions such as to reduce the liability of the petitioner for taxes for the calendar year 1953 in the amount of $8,682.84.

V

The facts upon which the petitioner relies as the basis of its proceedings are as follows:

A. and B. On August 11, 1944, the United States of America, pursuant to Executive Order No. 9462 issued by the President of the United States in exercise of the [fol. 80] powers granted by the Constitution of the United States, including the power of eminent domain, seized and took possession of all the real and personal property and other assets of the taxpayer used or useful in connection with the operation of its motor carrier transportation system, thereby depriving this taxpaye. of the use and possession of said property. Included in the property of the taxpayer thus seized by the United States of America on August 11, 1944, were five passenger or service vehicles, fifty-five tractor-trailer combinations, fourteen spare tractors, twenty-three pick-up and delivery trucks, and miscellaneous office furniture and equipment. In pursuance of a petition filed by the taxpayer with the Motor Carrier Claims Commission as provided by law, an order was entered by the Motor Carrier Claims Commission on March 31, 1952, awarding to the taxpayer just compensation under the Fifth Amendment to the Constitution of the United States as a result of the seizure and acquisition of the taxpayer's property by the United States of America on August 11, 1944. Subsequent thereto and prior to December 31, 1952, the taxpayer received from the United States of America $157,843.99 in full payment of the aforesaid award entered in its favor by the Motor Carrier Claims Commission. No part of the amount so received by this taxpayer is includible and taxable as part

of its ordinary income for the calendar year 1953. Attached hereto, marked Exhibit "B" and hereby made a part hereto, is a true and correct copy of the aforesaid award order of March 31, 1952, which was entered by the Motor Carrier Claims Commission.

[fol. 81] C. During the calendar year 1952, the petitioner suffered an operating loss in the amount of $36,634.37. Under Sections 23 (f) and 122 of the Internal Revenue Code of 1939, as amended, the petitioner was entitled to carry forward this loss to 1953 and to claim the whole whereof as a deduction in computing its taxable income for the calendar year 1953.

D. For and with respect to the petitioner's taxable calendar year ended December 31, 1955, the petitioner suffered a net operating loss in the amount of $23,506.35 as indicated on its duly filed Federal income tax return for said year. Under the provisions of Section 172(b)(1) of the Internal Revenue Code of 1954, the petitioner is entitled to carry this loss back to the calendar year 1953.

Wherefore, the petitioner prays that this Court may hear the proceedings and determine:

1. That the petitioner owes no further or additional income taxes for the calendar year 1952.

2. In the event that it be ultimately held that the amount received by the petitioner during the calendar year 1952 in payment of the aforesaid Government claim award is includible in the taxable income of the petitioner for that year, then that the said amount is taxable to the petitioner only as a gain arising out of the sale or exchange of a capital asset, and that the petitioner owes no further or additional income taxes for the calendar year 1952 except only such amount of income tax as is due by reason that the determination of said amount is taxable as a capital gain.

[fol. 82] 3. In the event that it is ultimately determined that the petitioner realized income to such an extent that petitioner has no operating loss carryforward to the calendar year 1953, then that the petitioner is entitled to a net operating loss carryback from the calendar year 1955 in the amount of $23,506.35 which will result in the petitioner ow-

ing no further income taxes for the calendar year 1953 except in the amount of $2,672.09.

Dated this 17th day of August, 1956.

Joseph A. Maun, William R. Busch, Lee N. Johnson, Attorneys for Petitioner, 425 Hamm Building, St. Paul 2, Minnesota.

Of Counsel: Bundlie, Kelley and Maun, 425 Hamm Building, St. Paul 2, Minnesota.

Duly sworn to by R. Cantlay and Ben H. Lovvorn (Jurats omitted in printing).

[fol. 83] IN THE TAX COURT OF THE UNITED STATES

ANSWER TO AMENDED PETITION.—Filed Dec. 3, 1956.

Comes now the Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for answer to the amended petition filed in this proceeding on November 5, 1956, admits and denies as follows:

I

Admits the allegations contained in paragraph I of the amended petition.

[fol. 84]

II

Admits that the Notice of Deficiency was mailed to the petitioner on May 11, 1955, and that a copy thereof is attached to the original petition filed in this proceeding on June 9, 1955, and marked Exhibit "A". Denies the remaining allegations contained in paragraph II of the amended petition.

III

Admits that the deficiencies as determined by the Commissioner of Internal Revenue are for income taxes for the

calendar years 1952 and 1953 in the respective amounts of $57,111.13 and $18,097.38. Denies the remaining allegations contained in paragraph III of the amended petition.

IV

A to D, inclusive. Denies that respondent's determination is based upon errors as alleged in subparagraphs A to D, inclusive, of paragraph IV of the amended petition.

V

A and B. Admits that on August 11, 1944, the United States of America, pursuant to Executive Order No. 9462 issued by the President of the United States in exercise of the powers granted by the Constitution of the United States, took possession of all the real and personal property and other assets of the taxpayer used or useful in connection with the operation of its motor carrier transportation [fol. 85] system. Admits that, in pursuance of a petition filed by the taxpayer with the Motor Carrier Claims Commission, an order was entered by the Motor Carrier Claims Commission on March 31, 1952. Admits that, subsequent thereto and prior to December 31, 1952, the taxpayer received from the United States of America $157,843.99 in payment of the aforesaid award entered in its favor by the Motor Carrier Claims Commission. Admits that no part of the amount so received by this taxpayer is includible and taxable as part of its ordinary income for the calendar year 1953, but denies that no part of the amount so received by this taxpayer is includible and taxable as part of its ordinary income for the calendar year 1952, if such allegation was intended by the petitioner. Denies the remaining allegations of fact contained in subparagraphs A and B of paragraph V of the amended petition.

C and D. Denies the allegations of fact contained in subparagraphs C and D of paragraph V of the amended petition.

Denies generally and specifically each and every allegation contained in the amended petition not hereinbefore expressly admitted, qualified, or denied.

Wherefore, it is prayed that the petitioner's appeal be denied and that the Commissioner's determination be approved.

/Signed/ John Potts Barnes, Chief Counsel, Internal Revenue Service.

[fol. 86] Of Counsel: J. Marvin Kelley, Regional Counsel, Paul M. Newton, Special Attorney, Internal Revenue Service, Room 523, 1114 Commerce, Dallas 2, Texas.

IN THE TAX COURT OF THE UNITED STATES

STIPULATION OF FACTS—Filed Nov. 1, 1957.

It is hereby stipulated and agreed, by and between the parties hereto by their respective counsel, that this proceeding shall be submitted as a stipulated case and that the following facts shall be taken as true:

1. Petitioner's income tax returns (Form 1120) for 1952 and for 1953, the taxable years involved, were timely filed with the District Director of Internal Revenue for Dallas, Texas. Photostatic copies of such returns are attached hereto and make a part hereof as Exhibits 1-A and 2-B respectively.

2. The Interstate Commerce Commission at all times had and exercised jurisdiction over petitioner with respect to rates to be charged for interstate shipment of freight. The Rules and Regulations of the Interstate Commerce Commission originally intended to have been attached as Exhibit 3-C have been omitted as unnecessary with the result that there is no exhibit of that designation.

[fol. 87] 3. Petitioner kept its books and records pursuant to the uniform system of accounts prescribed by the Interstate Commerce Commission. Its books and records were kept and its Federal income tax returns were filed on the accrual basis of accounting.

4. In conducting its transportation business from 1939 to August 11, 1944, petitioner owned and operated motor tractors, trucks, semi-trailers, pick-up and delivery trucks, and service cars. Petitioner also owned certain real estate

used as a terminal in the operation of its business and owned miscellaneous personal property, including office machines and equipment, all used in its business. That attached hereto, marked Exhibit 4-D and made a part hereof, is a true and correct listing of all such property showing the description, acquisition date, depreciation allowed, and cost basis as of August 11, 1944.

5. Under a statute entitled "An Act To Determine Claims of Certain Motor Carriers" enacted July 2, 1948 (62 Stat. 1222, Public Law No. 880) there was created and established a Motor Carrier Claims Commission. That this Act authorized the Commission to hear and determine according to law, existing claims against the United States arising out of the taking by the United States of possession and control of certain motor carrier transportation systems and their properties, including petitioner's, described in Executive Order No. 9462. That attached hereto and made a part hereof marked Exhibit 5-E is a true and correct copy of said Act.

6. During the year 1950, the petitioner herein filed a claim before the Motor Carrier Claims Commission for [fol. 88] compensation by reason of the taking of possession and control by the United States of America, of the property of petitioner described in Exhibit 6-F which is attached hereto and made a part hereof.

7. On the 31st day of March, 1952, the Motor Carrier Claims Commission handed down its findings of fact, conclusions of law and memorandum relative to the aforesaid claim filed by petitioner in 1950. The following findings of fact were made by the Motor Carrier Claims Commission and the facts so found are true and correct.

(a) Gillette Motor Transport, Inc., is and was at all times material to this action a corporation of Texas, with its principal place of business at Dallas, Texas.

(b) On and for some time prior to August 11, 1944, petitioner was authorized by appropriate Governmental agencies, both state and Federal, to engage in business as a common carrier of property by motor vehicle, and did operate its system and properties in pursuance of such business in the transportation of general commodities be-

tween various cities and towns located in a geographical area surrounding its principal place of business.

(c) In conducting its transportation business, petitioner owned and operated motor tractors, trucks, semi-trailers and pick-up and delivery trucks. Petitioner also owned or used certain real estate, and miscellaneous personal property such as office machines and equipment, shop and garage machines and equipment, and other items of property necessary and useful in a transportation business.

[fol. 89] (d) Petitioner and other motor carriers in the midwest were first required to enter into contracts with the union representing over-the-road drivers in 1939. The first contract was for the period from November 15, 1939 to November 15, 1941, and was the same contract then in effect or being placed in effect in the central states area. Similar contracts were placed in effect for the period from November 15, 1941 to November 15, 1943, although the midwest carriers sought to obtain a modification or "differential."

(e) In 1943 a group of carriers in the Midwest with common interest and similar operating conditions, including the petitioner, organized the Midwest Operators Association. This Association sought to negotiate a separate contract with the union.

(f) The negotiations between Midwest Operators Association and the union became deadlocked, and on October 13, 1943, the matter was certified to the National War Labor Board.

(g) On February 7, 1944, the National War Labor Board decided that the wage rates should be increased by 7¢ per hour and three-tenths of a cent per mile.

(h) Midwest Operators Association appealed to the National War Labor Board for a rehearing and reconsideration. Reconsideration was refused. The new contract was not put into effect by the Midwestern motor carriers.

(i) During the period from February 7, 1944 to August 4, 1944, midwestern carriers, including the petitioner, con-
[fol. 90] tinued to operate under the terms of the old contract. On August 4, 1944, a strike was begun by the drivers employed by the 103 carriers, members of the Midwest Operators Association, including the petitioner.

(j) The carriers recognized the fact that a refusal to sign the contract might result in a strike, so prior to the strike decided that if such a strike should come, they would "take the strike," because of their inability to pay the wage increases involved.

(k) After the strike of the drivers began on August 4, 1944, petitioner continued the transportation of general commodities long enough to deliver the freight in transit on August 4, 1944, and to clear its docks of freight which had accumulated prior to the strike. On or about August 5, 1944, all freight trucks and freight operations had stopped, and petitioner had ceased to operate as a common carrier. Its motor vehicles were idle. Petitioner's operations were shut down until August 14, 1944.

(l) On August 11, 1944, the President of the United States signed and issued Executive Order No. 9462, which order read as follows:

"Executive Order No. 9462

Possession and Operation of Certain Motor Carrier Transportation Systems

"Whereas, after investigation I find and proclaim that the motor carrier transportation systems of the motor carriers named in the list attached hereto and [fol. 91] made a part hereof are equipped for the transportation of materials of war and supplies that are required for the war effort, or useful in connection therewith, and are now engaged in such transportation; that there are threatened interruptions of the operation of said transportation systems as a result of a labor disturbance; that the war effort will be unduly impeded or delayed by such interruptions; that it has become necessary in the national defense to take possession and assume control of the said transportation systems for needful and desirable purposes connected with the prosecution of the war and that they be operated by or for the United States; and that the exercise, as hereinafter specified, of the powers vested in me is necessary to insure, in the interest of the war effort, the operation of said systems;

"Now Therefore, by virtue of the power and authority vested in me by the Constitution and laws of the United

States, including the Act of August 29, 1916, 39 Stat. 645, the First War Powers Act, 1941, and Section 9 of the Selective Training and Service Act of 1940 as amended by the War Labor Disputes Act, as President of the United States and Commander in Chief of the Army and Navy, it is hereby ordered as follows:

"1. The Director of the Office of Defense Transportation is authorized and directed, through or with the aid of any public officers, Federal Agencies, or other Government instrumentalities, that he may designate, to take possession and assume control of, and to operate, or arrange for the operation of, the motor carrier transportation systems of [fol. 92] the motor carriers named in the list attached hereto and made a part hereof, including all real and personal property and other assets, wherever situated, used or useful in connection with the operation of such systems, in such manner as he may deem necessary for the successful prosecution of the war; and to do anything that he may deem necessary to carry out the provisions and purposes of this order.

"2. Subject to the applicable provisions of existing law, including the orders of the Office of Defense Transportation, issued pursuant to Executive Orders 8989, as amended, 9156 and 9294, the said transportation systems shall be managed and operated under the terms and conditions of employment in effect between the carriers and the collective bargaining agents at the time possession is taken under this order. During his operation of said transportation systems the Director shall observe the terms and conditions of the directive order of the National War Labor Board, dated February 7, 1944; provided, however, that in the case of each said transportation system the Director is authorized to pay the wage increases provided for by the said directive order of the National War Labor Board, which accrued prior to the taking of possession of said system under this order, only out of the net operating revenue of the said system.

"3. Except with the prior written consent of the Director, no attachment by mesne process, garnishment, execution, or otherwise shall be levied on or against any of the real

[fol. 93] or personal property or other assets, tangible, or intangible, in the possession of the Director hereunder.

"4. Possession, control, and operation of any transportation system, or any part thereof, or any real or personal property, taken under this order shall be terminated by the Director when he determines that such possession, control, and operation are no longer necessary for the successful prosecution of the law.

"5. For the purposes of paragraphs 1 to 4, inclusive, of this order, there are hereby transferred to the Director the functions, powers, and duties vested in the Secretary of War by that part of Section 1 of the said Act of August 29, 1916, reading as follows:

"'The President, in time of war, is empowered through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable.'

"6. Upon request of the Director of the Office of Defense Transportation the Secretary of War is authorized to take any action that may be necessary to enable the Director to carry out the provisions and purposes of this order.

The White House.

/s/ Franklin D. Roosevelt".

[fol. 94] The carriers named in the list referred to in the Order and attached thereto were all members of Midwest Operators Association, and the list included the name of the petitioner herein.

(m) On the same date, August 11, 1944, the Director of the Office of Defense Transportation sent to the petitioner and petitioner received a telegram which read as follows:

August 11, 1944.

"By Order of the President and on Behalf of the United States I have today issued an Order taking Possession and Control as of 12:01 A.M. on August 12, 1944 of your

Motor Carrier Transportation System and all Property used or useful in the Operation thereof. Pending receipt of Operations Orders placed in the mail today you should continue to manage and operate or resume operation, if possible, in the usual manner. Operations Orders will contain further directions. Ellis T. Longenecker has been appointed Federal Manager in Charge of Operation of Systems taken over. On behalf of the Government and the Armed Forces I bespeak the full and hearty cooperation of both Management and Labor in the continuance or resumption of Transportation Service so sorely needed at this time to avoid imperiling an earlier conclusion of this War."

J. M. Johnson, Director of the Office of Defense Transportation.

(n) Also, on the same date, August 11, 1944, the Director of the Office of Defense Transportation issued and sent to petitioner a "Notice and Order Establishing Federal [fol. 95] Possession and Control and Appointing a Federal Manager," which read as follows:

"Notice and Order Establishing Federal Possession and Control and Appointing a Federal Manager.

"To each of the motor carriers named in an Executive Order of the President of the United States concerning the possession and operation of certain motor carrier transportation systems:

"1. You are hereby notified that, by order of the President of the United States (copy of Executive Order attached), possession and control of your motor carrier transportation system, including all real and personal property and other assets, wherever situated, used or useful in connection with the operation of such a system, are hereby taken and assumed by me as Director of the Office of Defense Transportation as of 12:01 A.M. on the Twelfth Day of August, 1944. Possession and control is not taken of any of your property, facilities, or other assets, which are not used or useful in the operation of your transportation system.

"2. The purpose of possession, control and operation of motor carrier transportation systems and properties by

the United States pursuant to said Executive Order is to assure the maintenance of an effective system of transportation for the movement of troops, materials of war, and supplies and food for the armed forces and the civilian population.

"3. Effective this date, Ellis T. Longenecker is hereby appointed Federal Manager of the motor carrier trans- [fol. 96] portation systems and properties taken hereunder, with full authority, subject to my direction:

"(a) To possess, control, and operate, or arrange for the operation of, each of the systems and properties taken hereunder in such manner as may be necessary for the successful prosecution of the war and maintenance of essential civilian economy and to accomplish the purposes of the Executive Order through or with the aid of such public or private agencies, persons, or corporations as he may designate:

"(b) Subject to the provisions of the Executive Order, to manage or operate or arrange for the management or operation of, said systems and properties under such terms and conditions of employment as he deems advisable and proper;

"(c) From time to time, to return to any of the motor carriers such real or personal property, or other assets of such carrier, as he determines to be unnecessary to the operation of its motor carrier transportation system; and,

"(d) To participate in joint action with other carriers pursuant to orders of the Office of Defense Transportation.

"4. A copy of this Notice and Order shall be posted by each carrier in the principal place of business or headquarters of its transportation system and in each terminal maintained in connection with its operation.

[fol. 97] "Issued at Washington, D. C., this Eleventh Day of August, 1944.

/s/ J. M. Johnson, Director of the Office of Defense Transportation.

(o) Ellis T. Longenecker, who was appointed by the Notice and Order above set out, as Federal Manager of

the motor carrier transportation systems and properties, assumed his duties as such manager on August 11, 1944.

(p) On August 11, 1944, Ellis T. Longenecker, as Federal Manager of motor carrier systems and properties, issued a written order entitled "Operations Order No. 1," which Order read as follows:

"Federal Manager of Motor Carrier Transportation Systems and Properties.

"Possession, Control and Operation of Motor Carriers Operations Order No. 1.

"To each of the motor carriers named in an Executive Order of the President of the United States concerning the possession and operation of certain motor carrier transportation systems:

"1. Until further order, you are hereby directed to resume or continue the operation of your motor carrier transportation system in the usual and ordinary manner and course of business, as a going enterprise, in your present corporate, partnership, individual, or trade name, as the case may be, and by means of the instrumentalities, [fol. 98] agents, officers, and employees customarily employed by you, as fully as if possession and control had not been taken and assumed by the United States, subject, however, to the terms of said Executive Order and to all general and special orders, rules, regulations, and directions, which may be issued thereunder. Title to the properties and other assets of which possession has been taken remains in the owners thereof. Possession by the United States is not exclusive, and the United States asserts, and will assert, only such control over the properties in its limited possession as may be necessary to accomplish the purposes of operation and of said Executive Order.

"2. Each motor carrier shall forthwith indicate its acceptance or rejection of the directions contained in section 1 of this Operations Order No. 1. Such acceptance or rejection shall be in writing, signed by this owner or duly authorized agent, and shall be addressed to the Federal Manager. Such acceptance or rejection by a corporate motor carrier shall be accompanied by a certified copy of a resolution adopted by its board of directors, or other governing body, accepting or rejecting the directions contained in said section 1.

"3. All personnel, officers, agents and employees, employed by you in the operation of the said system, are called upon to resume or continue the performance of their usual duties and in the customary manner until otherwise ordered. No such officer, agent, or employee shall be deemed to be an official or employee of the United States.

[fol. 99] "4. Subject to the terms of said Executive Order, and except as hereinafter provided, wage scales and working conditions in effect on the effective date of this order shall be maintained, and full recognition shall be given to the rights of the employees and all classes thereof. Each carrier shall observe the terms and conditions of the directive order of the National War Labor Board dated February 7, 1944, provided that wage increases provided for by the said directive order of the National War Labor Board, which accrued prior to the taking possession of its motor carrier transportation system pursuant to said Executive Order, shall be paid only out of the net operating revenue of said system. If, at the expiration of ninety (90) days from the date of this Operations Order No. 1, it appears that the net operating revenue of the motor carrier transportation system of any carrier possession of which is so taken, is, or will be, insufficient to pay the said accrued wage increases provided for by the said directive order of the National War Labor Board, such carrier shall make a report to the Federal Manager with respect thereto. Nothing in this order shall be construed so as to prevent or preclude any carrier from paying said accrued wage increases out of any other funds or assets available to it which are not necessary for the operation of its transportation system.

"5. All deductions for the benefit of employees now being made by law or agreement, including insurance payments, Social Security and Unemployment Compensation deductions, and other deductions of every kind, and all arrangements governing the payment of wages, including [fol. 100] war bond purchase plans, shall be continued subject to any legal right of discontinuance.

"6. Each motor carrier shall maintain its books and records in such manner that all transactions occurring after 12:01 A.M. of August 12, 1944, and during the period

its system and properties are in the possession of the United States, shall be separate, or may be readily separated, from previous transactions. Customary accounting procedures may be followed, and the records and books of account currently in use may be used so long as all transactions may be separated as provided in this section. Each motor carrier shall make such reports as the Federal Manager may, from time to time, request.

"7. The operation of any motor carrier transportation system hereunder shall be in conformity with the Interstate Commerce Act, as amended, and other applicable existing Federal and State laws, executive orders, and local ordinances, and rules and regulations issued pursuant to such laws, executive orders, or ordinances. Each motor carrier shall be deemed to remain subject to suit in the same manner and to the same extent as it was so subject prior to the possession of its system and properties by the United States. However, except with the prior written consent of the Director of the Office of Defense Transportation, no attachment by mesne process, garnishment, execution, or otherwise shall be levied on or against any of the real or personal property, or other assets, tangible or intangible, in the possession of the United States under said Executive Order. No motor carrier shall authorize or bring suit, accept service, or enter any legal proceedings, on behalf of the United [fol. 101] States, the Director of the Office of Defense Transportation, or the Federal Manager. Information as to the pendency, necessity, or probability of any legal proceeding which in any manner questions any right of the United States, the said Director or Federal Manager, shall be promptly furnished to the Federal Manager. Criminal laws protecting properties of the United States shall be deemed applicable to the system and properties of any motor carrier in the possession of the United States under the Executive Order.

"8. If any regulation, order, direction, or instruction issued by the Federal Manager, or by any of his representatives, interferes with the accomplishment of the purpose for which possession and control are taken hereunder, the management of any motor carrier affected thereby shall promptly notify the Federal Manager and

request a waiver or modification of such regulation, order, direction or instruction.

"9. Except and to the extent that a motor carrier objects to any action that it is required to take, pursuant to this or any other order, rule, regulation, or direction, of the Federal Manager, or of any of his representatives, pertaining to possession, control, and operation, under said Executive Order, such action and the consequences thereof shall be the sole responsibility of the motor carrier. Failure to object to any such required action in the manner provided in section 10 hereof shall be deemed to be a waiver of the right of the motor carrier to assert any claim for liability against the United States or its officers or agents with respect to damage allegedly resulting from any specific action so taken by it.

[fol. 102] "10. (a) Any motor carrier which objects to assuming sole responsibility with respect to action which it is required to take pursuant to this or any other order, rule, regulation, or direction, issued by the Federal Manager, or by any of his representatives, pertaining to possession, control, and operation, under the said Executive Order, shall protest such order, rule, regulations, or direction, to the Federal Manager, in writing, and in such protest shall specify:

(i) The particular order, rule regulation, or direction, which the motor carrier protests;

(ii) The action to be taken which, it is asserted, is required by such order, rule, regulation, or direction, which action would not otherwise be taken, and which action if taken, it is claimed, will result in damage to the motor carrier;

(iii) The extent to which the motor carrier asserts such order, rule, regulations, or direction, will result in damage to it if complied with;

(iv) The nature of the damage which the motor carrier asserts it will suffer as a result of compliance with such order, rule, regulation, or direction and an estimate of the amount of such asserted threatened damage.

(b) Each such protest shall be made to the Federal Manager by registered mail or telegram within five (5) days after the issuance of the particular order, rule, regulation, or direction, so protested.

[fol. 103] "11. Upon the protest by a motor carrier of any order, rule, regulation, or direction as provided in section 9 hereof, the effectiveness of the order, rule, regulation, or direction shall be suspended as to the protesting motor carrier pending further consideration and direction by the Federal Manager, and such motor carrier shall not take any action to carry into effect such order, rule, regulation, or direction until further directed so to do by the Federal Manager. The Federal Manager may thereafter direct that the protested order, rule regulation, or direction shall be forthwith placed into effect with such modification thereof, if any, as to the protesting carrier or others as he may deem necessary or desirable.

"12. Unless otherwise specifically directed, all communications concerning possession, control, and operation, under this Order shall be addressed to the Federal Manager, Metropolitan Life Building. Third Street and Second Avenue, Minneapolis, Minnesota.

"13. A copy of this Operations Order No. 1 shall be posted by each carrier in the principal place of business or headquarters of its transportation system and in each terminal maintained in connection with its operations.

Issued at Washington, D. C., this 11th day of August, 1944.

/s/ Ellis T. Longenecker, Federal Manager of Motor Carrier Transportation Systems and Properties."

[fol. 104] (q) A copy of the Executive Order described in Finding No. (1) and copy of the Notice and Order Establishing Federal Possession and Control and Appointing a Federal Manager, described in Finding No. (n), and also copy of Operations Order No. 1, described in Finding No. (p), were received by petitioner on or shortly after August 11, 1944.

(r) The Director of the Office of Defense Transportation carried out all the terms of Executive Order No. 9462 as directed; and the Federal Manager proceeded to put into effect the directions to him contained in the Notice and Order Establishing Federal Possession and Control and Appointing a Federal Manager.

(s) On August 12 and 13, 1944, a meeting of the midwest operators was called by the Secretary-Manager of the Midwest Operators Association. This meeting was held at Minneapolis, Minnesota, and was attended by Ellis T. Longenecker, Federal Manager; Lloyd P. Davis, Operating Manager under Mr. Longenecker; Clair M. Roddewig, General Counsel of the Office of Defense Transportation, representing the United States, and by representatives of midwest motor carriers named in the Executive Order, including the petitioner.

At this meeting the representatives of the United States distributed copies of Executive Order No. 9462, the Order Establishing Federal Possession and Control and Appointing a Federal Manager, and Operations Order No. 1, to the representatives of the carriers attending the meeting and these orders were read and discussed by Mr. [fol. 105] Longenecker and Mr. Roddewig with the representatives in the meeting. Mr. Longenecker and Mr. Roddewig advised the carriers, including petitioner, that the operation of their motor transportation systems was essential; and that the objectives of the Government were, (1) to assure a prompt resumption of the transportation facilities of the carriers involved, (2) to interfere with the management of these carriers as little as possible in accomplishing a resumption of the service, and (3) to accomplish these objectives as economically as possible.

Mr. Longenecker advised the motor carriers in the course of the meeting that these orders meant what they said and that the carriers could not dispose of their property or in any manner mortgage it without the approval of Mr. Longenecker. Mr. Longenecker urged the representatives of the motor carriers, including the petitioner, to return to their offices and to immediately arrange for a resumption of their motor carrier operations and to utilize their present personnel in the operation of their motor carrier transportation systems insofar as possible.

Mr. Longenecker advised the operators at the meeting that their properties were going to be operated and that if the people who owned and managed the properties did not see fit to operate them, that Mr. Longenecker, as

Federal Manager, would place his own representatives on the properties to see that they were operated. The provisions of Operations Order No. 1 were carefully explained to the carriers present at the meeting and by the second day of the meeting the discussion had reduced itself to the proposition that Mr. Longenecker and Mr. [fol. 106] Roddewig wanted the carriers to accept Operations Order No. 1, subject to the right of the carriers to protest and object to any of the provisions of said Operations Order No. 1. The carriers did agree to resume operation of their motor carrier transportation systems subject to their right to file written protests and objections to the provisions of Operations Order No. 1.

(t) During the period August 12, 1944 to June 16, 1945, the Federal Manager maintained supervision and ultimate control over all the operations of petitioner's transportation system.

(u) Within a short time after the issuance of Operations Order No. 1 and within the time allowed thereby for filing protest, petitioner filed with the Federal Manager a document in which it accepted section 1 of Operations Order No. 1 to the effect that petitioner should resume operations, but sought to reserve its right to any compensation to which it might be entitled and specifically protested the assumption by it of sole responsibility, financial or otherwise, for loss or damage arising out of any action it might be required to take.

(v) On or about August 15, 1944, the Federal Manager issued a notice and directed that each carrier, including petitioner, post it in the principal place of business or headquarters of its transportation system. This notice stated "At 12:01 A.M., on August 12, 1944, possession of the properties of this transportation system was taken by the United States under authority of the President's Executive Order dated August 11, 1944, and Notice and Order of the Director of the Office of Defense Transporta- [fol. 107] tion of the same date." The notice further called attention to the provisions of section 6 of the War Labor Disputes Act to the effect that any interference with the operation of any facility in the possession of the United States would constitute a criminal offense. Copies of said notice were posted as directed. [A true and cor-

rect copy of said notice is attached hereto, marked Exhibit 7-G, and made a part hereof.]

(w) During the period referred to above, members of the Federal Manager's staff made calls at petitioner's offices to observe petitioner's compliance with the orders and directives of the Federal Manager, and to submit suggestions and recommendations. Also, during this period, petitioner received orders and notices from the respondent relating, in general, to the operation of petitioner's motor carrier transportation system.

(x) The respondent fixed the amount of wages to be paid employees, specifically by ordering that over-the-road drivers be paid the wage increase prescribed by the National War Labor Board on February 7, 1944. This order was put into effect.

(y) On August 16, 1944, the Federal Manager, by "Accounting Circular No. 1" prescribed certain accounting methods and procedures which were put into effect by the Operating Manager. Among other things, this "Circular" called for certain inventories to be made as of 12:01 A. M., August 12, 1944. It also provided, "Transactions recorded in the books of original entry subsequent to 12:01 A. M., August 12, 1944, shall clearly indicate the portion, if any, applicable to the period prior thereto." [fol. 108] Another provision was: "The present ledger accounts shall be maintained solely for the purpose of posting entries applicable to the period prior to 12:01 A. M., August 12, 1944. New ledger accounts shall be opened for the purpose of entering the transactions applicable to the period subsequent thereto."

(z) The Federal Manager assumed control of rates and the publication thereof, in one instance ordering the publication by the Midwest Motor Freight Tariff Bureau of a new minimum charge rule, such minimum charge rule being subsequently placed into effect. In October of 1944, the Federal Manager issued an order to the petitioner that no independent rate action should be taken without the prior written approval of the Federal Manager's office.

(aa) Possession and control of petitioner's transportation system and property by the United States continued until June 16, 1945. By an order dated June 15, 1945, the Director of the Office of Defense Transportation

determined that it was practical to terminate possession, operation and control of petitioner's transportation system, and ordered that such possession, operation and control of petitioner's system and property be terminated and relinquished as of 12:01 A. M., June 16, 1945.

(bb) During the war period and specifically on August 11, 1944, there was a critical shortage of motor vehicles of all types. There was a need for such vehicles for the hauling of industrial products and agricultural commodities and for military use. There was a sharp demand for vehicles of the type owned by petitioner; petitioner's ve-
[fol. 109] hicles were suitable for leasing; and there existed on August 11, 1944, a rental market for each and every piece of petitioner's vehicular equipment. This rental market was in no way affected by the strike of over-the-road drivers.

(cc) The property owned or possessed by petitioner, and used by it in its transportation business on August 11, 1944, included certain improved real estate, and the following personal property, which was in serviceable condition: 5 passenger or service vehicles, 58 tractor-trailer combinations, 14 spare tractors, 23 pick-up and delivery trucks, and office furniture and equipment.

10. That the Motor Carrier Claims Commission in its finding which follows verbatim here, determined the compensation which petitioner was entitled under the Fifth Amendment of the Constitution of the United States for the taking of its property in the following manner:

(a) On August 11, 1944, and during the period thereafter until June 16, 1945, a reasonable net rental value for petitioner's tractor-trailer compinations used in intercity service, determined upon the basis of the owner's furnishing only the vehicles and bearing none of the operationg expense, was 5c per mile for the use of such combinations. This rate includes 3½c per mile for the tractor, and 1½c per mile for the trailer.

(b) All of petitioner's tractor-trailer combinations and extra tractors could have been leased out on and after August 11, 1944, for a minimum use of 5,000 miles per month per vehicle.

[fol. 110] (c) The total market net rental value for peti-

tioner's 55 tractor-trailer combinations for the period between August 11, 1944, and June 16, 1945, was $139,333.00.

(d) The total market net rental value for petitioner's 14 extra tractors for the period between August 11, 1944, and June 16, 1945, was $24,826.66.

(e) The market net rental value of each of petitioner's pick-up and delivery trucks on and after August 11, 1944, was $4.00 per day.

(f) The total market net rental value for petitioner's 23 pick-up and delivery trucks for the period between August 11, 1944, and June 16, 1945 was $24,380.00.

(g) The market net rental value of each of petitioner's passenger or service vehicles on and after August 11, 1944, was $30.00 per month.

(h) The total net rental value of petitioner's 5 passenger or service vehicles for the period between August 11, 11944, and June 16, 1945, was $1,520.00

(i) Among other property owned by petitioner on August 11, 1944 was certain office furniture and equipment, the cost of which was $13,081.30.

(j) The market net rental value of such office equipment on and after August 11, 1944, was 4% of the cost of such equipment per month.

[fol. 111] (k) The total market net rental value of such office equipment for the period between August 11, 1944, and June 16, 1945, was $5,302.26.

(l) During the period between August 11, 1944, and June 16, 1945, the operation of petitioner's transportation system resulted in an operating profit of $7,315.08. This sum was allowed to remain with petitioner's assets upon termination of Government control.

11. That throughout the period of Government possession and control, petitioner's Manager remained in the same position.

12. That the Motor Carrier Claims Commission, in its decision dated the 18th day of May, 1952, adopted the following as its conclusions of law:

(a) The Commission has jurisdiction over the petitioner's claim and over the parties to this proceeding.

(b) As of 12:01 A. M. on August 12, 1944, the petitioner's transportation system and all of its property used or useful in the operation of such system were taken for

public use by the respondent, the United States, and were thereafter possessed, controlled and used by the respondent until 12:01 A. M., June 16, 1945.

(c) The taking and use of petitioner's transportation system and properties require the payment of just compensation to petitioner by respondent under the terms of the Fifth Amendment to the Constitution of the United States.

[fol. 112] (d) As a part of just compensation the respondent, the United States, is indebted to petitioner, Gillette Motor Transport, Inc., in the following amounts as rental for the use of petitioner's properties during the period between August 11, 1944 and June 16, 1945:

For 55 tractor-trailer combinations	$139,333.00
For 14 spare tractors	24,826.66
For 23 pick-up and delivery trucks	24,380.00
For 5 passenger or service vehicles	1,520.00
office furniture and equipment	5,302.26
Total	$195,361.92

(e) As against said amount due to petitioner, the United States is entitled to a credit in the amount of $7,315.08.

(f) The United States is therefore indebted to Gillette Motor Transport, Inc. in the net amount of $188,046.84.

(g) The United States is further indebted to Gillette Motor Transport, Inc. in a sum equivalent to interest at 4% per annum on the sum of $188,046.84 from June 16, 1945 to date of payment, said sum also being a part of just compensation.

13. Petitioner did not resist the action of the Government under Executive Order No. 9462 on August 11, 1944, but did specifically reserve to itself the right to file and perfect claims, which it immediately asserted, for compensation for property taken by the United States of America. [fol. 113] 14. After June 16, 1945, when the petitioner was released from Federal control, efforts previously commenced to obtain just compensation were continued. Included in such efforts were oral conferences with representatives of the Office of Defense Transportation in late 1944 and early 1945 and in particular, a formal demand, dated September 10, 1945, upon the Director of the Office of Defense Transportation and the Federal Manager to take steps to determine such compensation, all as set out in

Exhibit 8-H attached hereto and made a part hereof. That the Office of Defense Transportation denied that there was any liability to the petitioner.

15. Subsequent to denial of liability by the Office of Defense Transportation, there was introduced in the Senate of the United States a bill known as S-1260, a true and correct copy of which is attached hereto as Exhibit 9-I and made a part hereof.

16. On or about the 15th day of July, 1947, there was introduced in the House of Representatives of the United States, a bill known as HR No. 4205, a true and correct copy of which is attached hereto marked Exhibit 10-J and made a part hereof.

17. The bill known as S-1260, after hearings on it in the Senate Committee on the Judiciary, was amended. A true and correct copy of the bill as so amended was enacted into law and is attached hereto marked Exhibit 5-E.

18. The House Judiciary Committee Report Number 2182 on S-1260 is attached hereto as Exhibit 11-K and made a part hereof.

[fol. 114] 19. Pursuant to Public Law No. 880, a Motor Carrier Claims Commission was established in August of 1949.

20. The first case presented to the Motor Carrier Claims Commission was known as the R-B Freight Lines, Inc. Attached hereto and made a part hereof, marked Exhibit 12-L, is a true and correct copy of the decision of the Motor Carrier Claims Commission in the R-B Freight Lines case.

21. There was an understanding between representatives of the carriers on the one hand and personnel of the United States Department of Justice on the other hand that both litigants would use their best efforts to make a full and complete record in the R-B Freight Lines case; and that thereafter the decision in the R-B Freight Lines case would establish the pattern for disposition of the cases to follow.

22. The Commission promulgated its decision in the R-B Freight Lines case on April 28, 1951.

23. A petition for certiorari was filed on December 19, 1951 in the United States Supreme Court by the United States, which petition was acquiesced in by counsel for R-B Freight Lines.

24. The petition for certiorari was denied by the United States Supreme Court on February 4, 1952.

25. The understanding referred to in paragraph 21 above between the carriers' representatives and the Department of Justice personnel was not followed. The Department of [fol. 115] Justice refused to go along with the R-B Freight Lines decision as a basis for settlement or disposition of the other claims because it desired to present to the Motor Carrier Claims Commission new and additional evidence bearing upon matters which it had considered unimportant prior to the decision in the R-B Freight Lines case; and because it desired to reiterate and further express the arguments previously advanced. At the time of this decision of the Department of Justice, there had been a change in policy-determining personnel because of the death of Colonel Edward Fell with whom the understanding previously referred to herein had been reached.

26. The following cases were submitted to the Commission immediately after the decision in the R-B Freight Lines decision:

Hawkeye Motor Express, Inc.
Hi-Speed Motor Expresss Inc.
Arkansas Motor Freight Lines, Inc.
Chief Freight Lines, Inc.
Dakota Transfer & Storage Co.
Witte Transportation Co.
Geo. Hart, dba Hart Motor Express Co.
Petitioner's Case
Lee Way Motor Freight, Inc.

The above entitled cases were selected for trial by counsel representing the Government.

27. The decisions in the foregoing cases were handed down by the Commission at various times in the Spring of 1952. The decision in the Chief Freight Lines [fol. 116] Inc. case, typical of the foregoing group of cases, was handed down on March 19, 1952.

28. On or about the 18th day of April, 1952, Mr. Robert G. May, representing the petitioner and other carriers, mailed to the Department of Justice a letter, a true and correct copy of which is attached hereto and made a part hereof, marked Exhibit 13-M. Although the principles of the R-B Freight Lines case had been followed by the Com-

mission in the Chief Freight Lines, Inc. and other cases, and the R-B Freight Lines decision had theretofore become final, it nevertheless appeared that there would be substantial delays in the processing of all the remaining cases to a final determination as long as the Government reserved its right to process each case separately and use up the full six months' period under which it had the technical right to file further petitioners for certiorari.

29. The carriers, including petitioner, were in need of money and as a result, in 1952, authorized and directed Mr. May to agree on their behalf to a stipulation with the Department of Justice under which the measure of compensation determined under the R-B Freight Lines principles would be reduced. Such a stipulation was entered into in each case, including that of petitioner, and filed with the Motor Carrier Claims Commission, wherein petitioner's net award as initially determined by the Motor Carrier Claims Commission was reduced from $195,361.92 to $122,926.21. A sum equivalent to interest accrued to time of payment on the reduced net amount of $122,926.21 amounted to $34,917.78 was also made part of the award. [fol. 117] 30. During the year 1952 petitioner received payment of the award determined by the Motor Carrier Claims Commission. Petitioner made no entry on its books and records of the award in any amount prior to the taxable year 1952.

31. Neither the United States of America nor petitioner appealed from the determination made by the Motor Carrier Claims Commission with respect to the determination made on behalf of the petitioner.

32. The Motor Carrier Claims Commission in its determination dated May 19, 1952, as to petitioner's claim, attached to its finding of fact and conclusions of law a memorandum entitled: "Reasons for Findings and Conclusions", a true and correct copy of which is attached hereto and marked Exhibit 14-N.

33. For and with respect to the taxable year ended December 31, 1952, petitioner made charitable donations in the amount of $803.60, none of which was deducted on its federal tax return for such year on account of the net loss as disclosed thereon. In the event that the Motor Carrier Claims Commission award, or any portion thereof,

is determined to constitute additional taxable income to the petitioner for 1952, the said $803.60 of donations, or a proportionate part thereof, as the case may be, is to be allowed as a deduction in determining petitioner's taxable income for such year.

34. For and with respect to the calendar taxable year ended December 31, 1953, charitable donations in the amount of $3,937.20 were made by petitioner. In the event [fol. 118] that the net operating loss deduction or any part thereof is disallowed to petitioner for 1953, then the amount of said donations, or a proportionate part thereof, as the case may be, is to be allowed as a deduction in determining petitioner's taxable income for such year.

35. For and with respect to its 1955 calendar taxable year, the petitioner sustained a net operating loss in the amount of $23,506.35. Such loss is a proper deduction as a carry-back loss to the calendar taxable year 1953.

/Signed/ Joseph A Maun, Counsel for Petitioner.
Nelson P. Rose, ATA, Chief Counsel, Internal Revenue Department, Counsel for Respondent.

Exhibit 1A—U. S. Corporation Income Tax Return of Gillette Motor Transport, Inc. for the Calendar Year 1952;
Exhibit 2B—U. S. Corporation Income Tax Return of Gillette Motor Transport, Inc. for the Calendar Year 1953;
Omitted from the printed record pursuant to designation of counsel as to printing record, copied at Page 1.

EXHIBIT 4-D

FIXED ASSETS - RECAP

GILLETTE MOTOR TRANSPORT, INC.

August 11, 1944

			COST	ESTIMATED LIFE IN MONTHS	DEPRECIATION	DEPRECIATED COST 8-11-44
Land and land rights in use						
August 11, 1944			8,156.25			8,156.25
Buildings and improvements						
December 31, 1943		20,878.95				
Add:						
New garage 6-15-44		10,072.76	30,951.71	300	4,380.70	26,571.01
Shop and garage equipment						
December 31, 1943		3,770.58				
Add:						
Speaker system 1-5-44		100.00	3,870.58	48	3,082.03	788.55
Furniture and fixtures						
December 31, 1943		12,447.32				
Add:						
Stove - 1-7-44	32.95					
Typewriter - 4-6-44	50.00					
2 chairs - 4-30-44	51.50					
Billing mach. - 5-10-44	51.00					
Steno chair - 5-31-44	22.50					
Phone table - 7-18-44	8.50					
Misc. furn. - 5-12-44	276.00					
Dock truck - 2-2-44	22.53					
Fan - 7-7-44	69.00					
Cabinet - 2-19-44	25.00					
Fan - 7-7-44	25.00	633.98	13,081.30	120	6,282.43	6,798.87
Warehouse and dock equipment						
December 31, 1943		1,861.74				

Buildings and improvements									
December 31, 1943		20,878.95							
Add:									
New garage 6-15-44		10,072.76	30,951.71		300			4,380.70	26,571.01
Shop and garage equipment									
December 31, 1943		3,770.58							
Add:									
Speaker system 1-5-44		100.00	3,870.58		48			3,082.03	788.55
Furniture and fixtures									
December 31, 1943		12,447.32							
Add:									
Stove - 1-7-44	32.95								
Typewriter - 4-6-44	50.00								
2 chairs - 4-30-44	51.50								
Billing mach. - 5-10-44	51.00								
Steno chair - 5-31-44	22.50								
Phone table - 7-18-44	8.50								
Misc. furn. - 5-12-44	276.00								
Dock truck - 2-2-44	22.53								
Fan - 7-7-44	69.00								
Cabinet - 2-19-44	25.00								
Fan - 7-7-44	25.00	633.98	13,081.30		120			6,282.43	6,798.87
Warehouse and dock equipment									
December 31, 1943		1,861.74							
Add:									
4 dock trucks - 2-2-44		90.12	1,951.86		120			1,142.36	809.50
			58,011.70					14,887.52	43,124.18
Service equipment			5,027.50		Various			2,935.58	2,091.92
Revenue equipment:									
Pickup trucks			13,681.04		Various			11,709.08	1,971.96
Tractors			95,695.18		Various			60,604.39	35,090.79
Trailers			80,665.78		Various			52,868.75	27,797.03
			253,081.20					143,005.32	110,075.88

T.S. 7-22-57

EQUIPMENT

Hillette Motor Transit, Inc.

AUGUST 11, 1944

EQUIP. No.	MAKE	MODEL	DATE ACQUIRED	COST	ESTIMATED LIFE IN MONTHS	MONTHS FROM DATE OF ACQ. TO 8-11-44	% DEPR.	DEPRECIATION	DEPRECIATED COST 8-11-44
	SERVICE EQUIPMENT								
PA-1470711	Plymouth Coupe	1940	1-1-42	$ 1000 00	48	31 1/3	65 28	$ 652 80	$ 347 20
6411971	Buick Sedanette	1941	1-1-42	1000 00	48	31 1/3	65 28	652 80	347 20
3261922	Chevrolet Special Coupe	1940	1-1-42	1000 00	48	31 1/3	65 28	652 80	347 20
4119578	Chevrolet Coupe	1934	3-30-40	200 00	48	48	100 00	200 00	- 0 -
18-3965984	Ford Coupe	1937	9-30-42	300 00	48	22 2/3	46 53	139 59	160 41
45-116546	Ford Tudor	1938	7-30-42	400 00	48	22 2/3	46 53	186 12	213 88
6-46311	Oldsmobile Club Coupe	1939	9-1-42	450 00	48	23 1/3	48 61	218 75	231 25
3825354	Ford - light delivery	1930	4-30-43	175 00	36	15	42 59	74 53	100 47
K-2597650	Chevrolet	1939	8-20-43	502 50	36	11 2/3	31 48	158 19	344 31
				$ 5027 50				$ 2135 58	$ 2891 92
	REVENUE EQUIPMENT								
PICKUP	TRUCKS								
3	GMC	1½ ton	1937	[illegible]	36	18 5	50 93	$ 112 03	$ 107 94
12	Chevrolet	1½ "	1936	8 3 3 26	24	24	100 00	833 26	- 0 -
9	Chevrolet	1½ "	1938	626 13	36	36	100 00	626 13	- 0 -
17	Chevrolet	3/4 "	1937	346 00	36	35	97 22	330 55	9 45
18	Chevrolet	1½ "	1938	1036 00	36	36	100 00	1036 00	- 0 -
20	Chevrolet	1½ "	1936	933 72	36	36	100 00	933 72	- 0 -
28	Chevrolet	1½ "	1936	166 67	36	18 1/3	50 93	84 89	81 78
31	Chevrolet	1½ "	1939	438 11	36	18 1/3	50 93	223 54	215 37
33	Chevrolet	1½ "	1938	1256 13	36	36	100 00	1256 13	- 0 -
35	Chevrolet	1½ "	1937	273 81	24	24	100 00	273 81	- 0 -
36	Chevrolet	1½ "	1937	1312 17	24	24	100 00	1312 17	- 0 -
53	International	A-3	1932	150 00	24	24	100 00	150 00	- 0 -
54	International	C-35	1934	200 00	24	24	100 00	200 00	- 0 -
56	Chevrolet	1½ ton	1939	467 15	36	18 1/3	50 93	238 33	228 82
57	Ford	1½ "	1939	1290 31	36	36	100 00	1290 31	- 0 -
72	Chevrolet	1½ "	1932	475 00	24	24	100 00	475 00	- 0 -

4119578	Chevrolet Coupe		1934	3-30-40	200 00	48	48	100 00	200 00	+ 0 +			
18-3965984	Ford Coupe		1937	9-30-42	300 00	48	22 Y3	46 53	139 59	160 41			
45-116546	Ford Tudor		1938	7-30-42	400 00	48	22 Y3	46 53	186 12	213 88			
6-46311	Oldsmobile Club Coupe		1939	9-1-42	450 00	48	23 Y3	48 61	218 75	231 25			
3825354	Ford - Light Delivery		1930	4-30-43	175 00	36	15	42 59	74 53	100 47			
K-259650	Chevrolet		1939	8-20-43	500 50	36	11 3/3	31 48	158 19	344 31			
					$ 1502 50				$ 2135 58	$ 2011 92			
	REVENUE EQUIPMENT												
PICKUP TRUCKS													
3	GMC	1½ ton	1937	2-1-43	1111	36	18	50 93	$ 1120 3	$ 107 74			
12	Chevrolet	1½ "	1936	3-18-35	873 26	24	24	100 00	873 26	- 0 -			
9	Chevrolet	1½ "	1938	3-2-40	1261 3	36	36	100 00	626 13	- 0 -			
17	Chevrolet	¾ "	1937	9-15-41	3460 00	36	35	97 22	3305 55	945			
18	Chevrolet	1½ "	1938	5-21-38	1036 00	36	36	100 00	1036 00	- 0 -			
20	Chevrolet	1½ "	1936	3-18-36	933 72	36	36	100 00	933 72	- 0 -			
28	Chevrolet	1½ "	1936	2-1-43	1666 7	36	18 1/3	50 93	848 9	817 8			
31	Chevrolet	1½ "	1939	2-1-43	4381 1	36	18 1/3	50 93	2235 4	2145 7			
33	Chevrolet	1½ "	1938	3-15-38	1256 13	36	36	100 00	1256 13	- 0 -			
35	Chevrolet	1½ "	1937	11-30-37	273 81	24	24	100 00	273 81	- 0 -			
36	Chevrolet	1½ "	1937	3-15-37	1312 17	24	24	100 00	1312 17	- 0 -			
53	International	A-3	1932	7-30-37	150 00	24	24	100 00	150 00	- 0 -			
54	International	C/35	1934	1-10-38	200 00	24	24	100 00	200 00	- 0 -			
56	Chevrolet	1½ ton	1939	2-1-43	4699 5	36	18 1/3	50 93	2383 3	2277 62			
57	Ford	1½ "	1935	3-15-38	1290 31	36	36	100 00	1210 31	- 0 -			
72	Chevrolet	1½ "	1938	2-10-40	475 00	36	36	100 00	475 00	- 0 -			
73	Chevrolet	1½ "	1938	2-10-40	500 00	36	36	100 00	500 00	- 0 -			
76	Chevrolet	1½ "	1938	4-1-40	4784 3	36	36	100 00	4784 3	- 0 -			
77	Chevrolet	1½ "	1939	1-13-41	5917 8	36	36	100 00	5917 8	- 0 -			
95	International	1½ "	1937	7-15-43	550 00	36	13	36 11	1986 1	351 39			
96	International	1½ "	1937	7-15-43	425 00	36	13	36 11	1534 7	271 53			
97	International	1½ "	1935	7-15-43	425 00	36	13	36 11	1534 7	271 53			
99	Chevrolet	1½ "	1938	8-15-43	650 00	36	12	33 33	2166 5	433 35			
					$ 13681 04				$ 11709 03	$ 1971 96			

[fol. 121]

JG 7-22-59

EQUIPMENT (Contd.) Pg 2

Gillette Motor Transport, Inc

AUGUST 11, 1944

EQUIP No	MAKE	MODEL	DATE ACQUIRED	COST	ESTIMATED LIFE IN MONTHS	MONTHS FROM DATE OF ACQ TO 8-1-44	% DEPR.	DEPRECIATION	DEPRECIATED COST 8-11-44
	REVENUE EQUIPMENT (Contd)								
TRACTORS									
6	International	2-T DS-40	3-21-40	11774 04	48	48	100 00	11774 04	-0-
7	Chevrolet	1½-T	11-30-39	8024 3	36	36	100 00	8024 3	-0-
8	Chevrolet	1½-T	3-15-38	10270 0	36	36	100 00	10270 0	-0-
10	International	K7	6-1-44	1606 50	48	2 1/3	4 86	78 08	1528 42
11	International	2-T	3-15-38	16673 5	48	48	100 00	16673 5	-0-
14	International	2-T DS-40	3-21-40	8770 4	48	48	100 00	8770 4	-0-
15	Chevrolet	1½ T	4-22-38	5550 0	48	48	100 00	5550 0	-0-
16	International	2-T D-40	3-12-43	19997 7	36	16 2/3	46 31	9260 9	10736 8
19	International	2-T D-35	3-12-43	18086 0	36	16 2/3	46 31	8375 6	9710 4
21	International	2-T DS-35	3-29-40	12355 4	48	48	100 00	12355 4	-0-
22	International	2-T K-7	7-31-44	15346 7	48	1/3	69	1059	15240 8
23	Ford	1½-T	9-30-37	9140 0	24	24	100 00	9140 0	-0-
24	International	2-T DS-35	2-29-40	10578 9	48	48	100 00	10578 9	-0-
25	International	2-T	6-15-38	17848 9	48	48	100 00	17848 9	-0-
26	International	2-T	6-1-38	17517 5	42	42	100 00	17517 5	-0-
27	Ford	1½-T	2-15-40	7013 4	36	36	100 00	7013 4	-0-
29	Ford	1½-T	9-30-37	9262 5	24	24	100 00	9262 5	-0-
30	International	2-T DS-35	3-21-40	9552 8	48	48	100 00	9552 8	-0-
32	Chevrolet	1½-T	2-1-37	9795 5	24	24	400 00	9795 5	-0-
34	Ford	1½-T	8-29-36	10786 4	24	24	100 00	10786 4	-0-
37	International	2-T K-7	6-1-44	1606 50	48	2 1/3	486	7808	15284 2
38	Chevrolet	1½-T	11-30-39	7483 2	36	36	100 00	7483 2	-0-
39	International	2-T DS-35	4-3-39	8546 0	48	48	100 00	8546 0	-0-
40	International	2-T	10-31-37	17442 7	36	36	100 00	17442 7	-0-
41	Chevrolet	1½-T	11-30-39	8347 2	36	36	100 00	8347 2	-0-
42	International	2-T DS-35	4-3-39	7407 7	48	48	100 00	7407 7	-0-
43	Chevrolet	1½-T	11-30-39	8445 6	60	56 1/3	93 89	7929 6	516 0
44	International	2-T K-7	3-9-43	19015 4	36	16 2/3	46 31	8806 0	10209 4
45	International	2-T DS-35	2-29-40	10520 2	48	48	100 00	10520 2	-0-
46	International	2-T K-7	6-1-44	1606 50	48	2 1/3	486	7808	15284 2
								9118 2	-0-

7	Chevrolet	1½-T			11-30-39	802	43	36		36			100	00	808	43	-0-
8	Chevrolet	1½-T			3-15-38	1027	00	36		36			100	00	1027	00	-0-
10	International	K 7			6-1-44	1606	50	48		2	1/3		4	86	78	08	1528	42
11	International	2-T			3-15-38	1667	35	48		48			100	00	1667	35	-0-	
14	International	2-T	DS-	40	3-21-40	877	04	48		48			100	00	877	04	-0-	
15	Chevrolet	1½ T			4-22-38	555	00	48		48			100	00	555	00	-0-	
16	International	2-T	D-	40	3-12-43	1999	77	36		16	2/3		46	31	926	09	1073	68
19	International	2-T	D-	35	3-12-43	1808	60	36		16	2/3		46	31	837	56	971	04
21	International	2-T	DS-	35	3-29-40	1235	54	48		48			100	00	1235	54	-0-	
22	International	2-T	K-	7	7-31-44	1534	67	48			1/3			69	1	059	1524	08
23	Ford	1½-T			9-30-37	914	00	24		24			100	00	914	00	-0-	
24	International	2-T	DS-	85	2-29-40	1057	89	48		48			100	00	1057	89	-0-	
25	International	2-T			6-15-38	1784	89	48		48			100	00	1784	89	-0-	
26	International	2-T			6-1-38	1751	75	42		42			100	00	1751	75	-0-	
27	Ford	1½-T			2-15-40	701	34	36		36			100	00	701	34	-0-	
29	Ford	1½-T			9-30-37	926	25	24		24			100	00	926	25	-0-	
30	International	2-T	DS-	35	3-21-40	955	28	48		48			100	00	955	28	-0-	
32	Chevrolet	1½-T			2-1-37	979	55	24		24			100	00	979	55	-0-	
34	Ford	1½-T			8-29-36	1078	64	24		24			100	00	1078	64	-0-	
37	International	2-T	K-	7	6-1-44	1606	50	48		2	1/3		4	86	78	08	1528	42
38	Chevrolet	1½-T			11-30-39	748	32	36		36			100	00	748	32	-0-	
39	International	2-T	DS-	35	4-3-39	854	60	48		48			100	00	854	60	-0-	
40	International	2-T			10-31-37	1744	27	36		36			100	00	1744	27	-0-	
41	Chevrolet	1½-T			11-30-39	834	72	36		36			100	00	834	72	-0-	
42	International	2-T	DS-	35	4-3-39	740	77	48		48			100	00	740	77	-0-	
43	Chevrolet	1½-T			11-30-39	844	56	60		56	1/3		93	89	792	96	51	60
44	International	2-T	K-	7	3-9-43	1901	54	36		16	2/3		46	31	880	60	1020	94
45	International	2-T	DS-	35	2-29-40	1052	02	48		48			100	00	1052	02	-0-	
46	International	2-T	K-	7	6-1-44	1606	50	48		2	1/3		4	86	78	08	1528	42
47	Chevrolet	1½-T			11-30-37	911	52	36		36			100	00	911	52	-0-	
48	Chevrolet	1½-T			7-20-43	550	00	36		12	2/3		35	19	193	55	356	45
49	International	2-T	DS-	35	3-21-40	934	24	48		48			100	00	934	24	-0-	
50	International	2-T	D-	35	4-30-43	1249	77	36		15	1/3		42	59	532	28	717	49
51	White	2-T	WA-	22	3-15-44	3035	74	48		5			10	42	316	26	2718	88
52	International	2-T	K-	7	7-31-44	1534	67	48			1/3			69	1	059	1524	08
58	Ford	1½-T			4-25-38	906	92	36		36			100	00	906	92	-0-	
59	International	2-T	DS-	35	11-26-41	67	82	48		32	1/2		67	71	45	92	21	90
4	International	2-T	K-	7	8-4-44	1534	67	48		-0-			-0-		-0-		1534	67
						47102	08								31002	01	16100	07

[fol. 122]

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EQUIPMENT (Cont'd) Pg. 3

Gillette Motor Transport, Inc.

AUGUST 11, 1944

EQUIP NO.	MAKE	MODEL	DATE ACQUIRED	COST	ESTIMATED LIFE IN MONTHS	MONTHS FROM DATE OF ACQ. TO 8-11-44	% DEPR.	DEPRECIATION	DEPRECIATED COST 7-1-44
	REVENUE EQUIPMENT (Cont'd)								
TRACTORS (Cont'd)									
60	International	2-T K-7	6-1-44	1606 50	48	2 1/3	486	7808	1528 42
61	Ford	1½-T	1-25-31	713 69	36	36	100 00	713 69	-0-
61	International	2-T K-7	6-1-44	1606 50	48	2 1/3	486	7808	1528 42
62	Chevrolet	1½-T	3-15-44	1055 00	36	5	1389	1465 4	908 46
63	White	2-T WA-22	3-15-44	3035 14	48	5	1042	3162 6	2718 88
64	International	2-T KS-7	3-15-41	1220 79	48	41	8542	1042 80	177 99
65	International	2-T DS-35	4-3-31	1327 56	48	48	100 00	1327 56	-0-
66	International	2-T DS-35	4-3-31	1327 56	48	48	100 00	1327 56	-0-
67	Chevrolet	1½-T	7-22-31	808 36	36	36	100 00	808 36	-0-
68	Chevrolet	1½-T	10-18-31	748 58	36	36	100 00	748 58	-0-
69	Chevrolet	1½-T	11-30-31	934 00	36	36	100 00	934 00	-0-
70	Chevrolet	1½-T	11-30-31	934 00	36	36	100 00	934 00	-0-
71	Chevrolet	1½-T	11-30-31	934 00	36	36	100 00	934 00	-0-
74	International	2-T DS-40	3-21-40	1402 08	48	48	100 00	1402 08	-0-
75	International	2-T DS-35	3-21-40	1117 25	48	48	100 00	1117 25	-0-
77	Chevrolet	1½-T	7-26-40	714 70	36	36	100 00	714 70	-0-
78	Chevrolet	1½-T	7-26-40	714 70	36	36	100 00	714 70	-0-
80	International	2-T KS-7	3-15-41	1491 70	48	41	8542	1274 21	217 49
81	International	2-T KS-7	3-15-41	1491 70	48	41	8542	1274 21	217 49
82	International	2-T K-7	4-1-41	1511 98	48	40 1/3	8403	1270 52	241 46
83	International	2-T K-7	4-1-41	1511 98	48	40 1/3	8403	1270 52	241 46
84	International	2-T K-7	6-25-41	1511 98	48	37 1/2	7813	1181 31	330 67
85	International	2-T K-7	6-25-41	1511 98	48	37 1/2	7813	1181 31	330 67
86	International	2-T K-7	6-25-41	1511 98	48	37 1/2	7813	1181 31	330 67
87	International	2-T K-7	7-31-41	1606 94	48	36 1/3	7569	1216 29	390 65
88	International	2-T K-7	7-31-41	1606 94	48	36 1/3	7569	1216 29	390 65
89	International	2-T KS-6	9-15-41	1380 89	48	35	7292	1006 94	373 95
90	International	2-T KS-6	9-15-41	1380 89	48	35	7292	1006 94	373 95
91	Chevrolet	1½-T	10-24-41	1000 00	36	33 1/2	9306	930 60	69 40
						10 M	1139	787 55	744 45

	[illegible]																
61	Ford	1½-T			1-25-31	7136	7	36		36		100	00	11367		0-	
61	International	2-T	K-7		6-1-44	16065	0	48		2 1/3		486		7808		1522	42
62	Chevrolet	1½-T			3-15-44	10550	0	36		5		1389		14654		908	46
63	White	2-T	WA-22		3-15-44	36351	4	48		5		1042		31626		2718	88
64	International	2-T	KS-7		3-15-41	12079		48		41		8542		104280		1779	99
65	International	2-T	DS-35		4-3-31	13275	6	48		48		100	00	13275	6	-0-	
66	International	2-T	DS-35		4-3-31	13275	4	48		48		100	00	13275	6	-0-	
67	Chevrolet	1½-T			7-22-31	8083	6	36		36		100	00	8083	6	-0-	
68	Chevrolet	1½-T			10-18-31	7485	8	36		36		100	00	7485	8	-0-	
69	Chevrolet	1½-T			11-30-31	7340	0	36		36		100	00	9340	0	-0-	
70	Chevrolet	1½-T			11-30-31	7340	0	36		36		100	00	9340	0	-0-	
71	Chevrolet	1½-T			11-30-31	7340	0	36		36		100	00	7340	0	-0-	
74	International	2-T	DS-40		3-21-40	14022	8	48		48		100	00	14022	8	-0-	
75	International	2-T	DS-35		3-21-40	11112	5	48		48		100	00	11112	5	-0-	
77	Chevrolet	1½-T			7-26-40	7140	0	36		36		100	00	7140	0	-0-	
78	Chevrolet	1½-T			7-26-40	7140	0	36		36		100	00	7140	0	-0-	
80	International	2-T	KS-7		3-15-41	14117	0	48		41		8542		12742	1	217	49
81	International	2-T	KS-7		3-15-41	14717	0	48		41		8542		12742	1	217	49
82	International	2-T	K-7		4-1-41	15111	8	48		40 1/3		8403		12705	2	241	46
83	International	2-T	K-7		4-1-41	15111	8	48		40 1/3		8403		12705	2	241	46
84	International	2-T	K-7		6-25-41	15111	8	48		37 1/2		7813		11813	1	330	67
85	International	2-T	K-7		6-25-41	15111	8	48		37 1/2		7813		11813	1	330	67
86	International	2-T	K-7		6-25-41	15119	8	48		37 1/2		7813		11813	1	330	67
87	International	2-T	K-7		7-31-41	16066	4	48		36 1/3		7569		12162	9	390	65
88	International	2-T	K-7		7-31-41	16066	4	48		36 1/3		7569		12162	9	390	65
89	International	2-T	KS-6		9-15-41	13806	9	48		35		7292		10069	4	373	95
90	International	2-T	KS-6		9-15-41	13806	9	48		35		7292		10069	4	373	95
91	Chevrolet	1½-T			10-24-41	10000	0	36		33 1/2		9306		9306	0	69	40
92	International	2-T	K-6		1-21-43	15320	0	36		18 1/2		5139		7875	5	744	45
93	International	2-T	D-35		4-3-43	14417	7	36		16 1/3		4537		6804	5	819	32
94	International	2-T	K-7		7-31-44	15346	7	48		1/3		69		1059		1524	08
98	International	2-T			2-15-43	4500	0	36		12		3333		15000		3000	00
101	Chevrolet	1½-T			1-6-44	11582	2	48		7		1458		16887		989	35
102	Chevrolet	1½-T			1-6-44	12701	0	48		7		1458		15602		914	08
103	Chevrolet	1½-T			1-6-44	10457	0	48		7		1458		15246		893	24
104	Chevrolet	1½-T			1-17-44	10457	0	48		6 2/3		1390		14535		900	35
5	International (NO CARD)	2-T	K-7		8-4-44	15346	7	48		-0-		-0-		-0-		1534	67
						$ 95615	18							$ 60604	39	$ 35290	79

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EQUIPMENT

Gillette Motor Transport, Inc

August 11, 1944

EQUIP No	MAKE	MODEL	DATE ACQUIRED	COST	ESTIMATED LIFE IN MONTHS	MONTHS FROM DATE OF ACQ TO 8-11-44	% DEPR	DEPRECIATION	DEPRECIATED COST 8-11-44
	REVENUE EQUIPMENT (Contd)								
TRAILERS	YEAR								
7-A	Fruehauf	1937	12-31-37	1356 00	48	47	100 00	$ 1356 00	-0-
8-A	Fruehauf	1937	2-1-37	1461 72	48	48	100 00	1469 72	-0-
10-A	Fruehauf	FF-226	12-15-41	1018 27	60	32	53 33	543 04	475 23
11-A	Fruehauf	224	11-15-40	512 12	60	45	75 00	384 09	128 03
12-A	Fruehauf	1937	10-15-40	645 98	60	46	76 67	495 27	150 71
18-A	Fruehauf	5-T FF-226	8-1-44	1712 97	60	-	56	9 59	1703 38
19-A	Fruehauf	FF-224	2-15-41	1722 52	60	42	70 00	1205 76	516 76
21-A	Fruehauf	1937	2-1-37	1300 00	48	48	100 00	1300 00	-0-
22-A	Fruehauf	5-T FF-226	8-1-44	1712 97	60		56	9 59	1703 38
23-A	Fruehauf	1938	7-15-38	1300 00		60	100 00	1300 00	-0-
24-A	Fruehauf	222	6-15-39	1642 00	60	60	100 00	1642 00	-0-
25-A	Fruehauf	FF226	12-15-41	1518 27	60	32	53 33	809 69	708 58
26-A	Fruehauf	1938	12-31-37	1735 50	60	60	100 00	1735 50	-0-
27-A	Fruehauf	FFR	2-10-40	803 13	60	54	90 00	722 82	80 31
28-A	Shop Made		8-2-40	500 00	48	48	100 00	500 00	-0-
29-A	Fruehauf	FAR-222	6-15-40	1240 59	60	50	83 33	1033 78	206 81
30-A	Fruehauf	1936	3-15-41	934 67	60	41	68 33	642 08	237 59
31-A	Fruehauf	FFR-224	5-15-41	1712 52	60	33	65 00	1113 14	599 38
32-A	Carter	1934	11-1-35	500 00	36	36	100 00	500 00	-0-
33-A	Fruehauf	1937	3-15-37	1503 80	60	60	100 00	1503 80	-0-
34-A	Fruehauf	1936	8-22-36	1619 89	48	48	100 00	1619 89	-0-
35-A	Fruehauf	622-24	3-26-40	925 00	60	52 ½	87 50	809 38	115 62
36-A	Fruehauf	1937	3-15-37	1503 80	48	48	100 00	1503 80	-0-
37-A	Fruehauf	1938	7-15-38	1300 00	60	60	100 00	1300 00	-0-
38-A	Fruehauf	1937	3-15-37	1330 00	48	48	100 00	1330 00	-0-
39-A	Fruehauf	5-T FF-226	8-1-44	1712 97	60		56	9 59	1703 38
40-A	Fruehauf	FF-224	11-30-40	617 84	60	44 ⅓	73 84	456 52	161 32
41-A	Fruehauf	1937	4-15-37	1330 00	48	48	100 00	1330 00	-0-
42-A	Fruehauf	1937	5-15-37	1450 00	48	48	100 00	1450 00	-0-
			[illegible]	[illegible]	60	35	58 33	735 18	525 20

| | | |

[fol. 124]

EQUIPMENT

Gillette Motor Transport, Inc

AUGUST 11, 1944

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EQUIP No	MAKE	MODEL	DATE ACQUIRED	COST	ESTIMATED LIFE IN MONTHS	MONTHS FROM DATE OF ACQ TO 8-11-44	% DEPR.	DEPRECIATION	DEPRECIATED COST 8-11-44
	REVENUE EQUIPMENT (Cont'd)								
	TRAILERS (Cont'd) YEAR								
52-A	Fruehauf 1935		11-1-35	$ 1100 00	36	36	100 00	$ 1100 00	-0-
53-A	Fruehauf 1938		10-19-38	1220 00	60	60	100 00	1220 00	-0-
54-A	Fruehauf	FFR-222	8-15-40	1338 67	60	48	80 00	1070 94	267 73
55-A	Fruehauf	FF-226	12-15-41	1518 27	60	32	53 33	809 69	708 58
56-A	Keystone	10 T	3-12-43	1810 16	60	17	28 33	512 82	1297 34
57-A	Keystone	10 T	3-12-43	1810 16	60	17	28 33	512 82	1297 34
58-A	Fruehauf	FF-222	3-12-43	2060 16	60	17	28 33	583 64	1476 52
59-A	Superior 1940		4-30-43	2310 16	60	15 1/3	25 56	590 48	1719 68
60-A	Fruehauf 1939		4-30-43	2070 20	60	15 1/3	25 56	532 47	1550 73
61-A	Fruehauf	222	2-2-31	1480 80	60	60	100 00	1480 80	-0-
62-A	Fruehauf	222	2-2-31	1480 80	60	60	100 00	1480 80	-0-
63-A	Fruehauf	FFR-224	2-28-41	1725 52	60	41 1/3	68 89	1186 64	535 88
64-A	Fruehauf	FO-226	9-15-41	1399 77	60	35	58 33	816 49	583 28
65-A	Fruehauf	FO-226	9-15-41	1317 88	60	35	58 33	768 72	549 16
66-A	Fruehauf	FF-226	2-1-43	1873 55	60	18 1/3	30 56	572 56	1300 99
67-A	Fruehauf	FF-226	2-1-43	1873 55	60	18 1/3	30 56	572 56	1300 99
68-A	Kentucky	10 T	5-1-43	1850 76	60	15 1/3	25 56	473 05	1377 71
69-A	Fruehauf	FF-226 Spl	1-1-44	1820 24	60	7 1/3	12 22	222 43	1597 81
70-A	Fruehauf	FF 226 Spl	1-1-44	1820 24	60	7 1/3	12 22	222 43	1597 81
				$ 80665 78				$ 52868 75	$ 27797 03

[fol. 125] EXHIBIT 5-E TO STIPULATION OF FACTS

Act of July 2, 1948, 62 Stat. 1222:

An Act

To create a commission to hear and determine the claims of certain motor carriers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby created and established a Motor Carrier Claims Commission, hereafter referred to as the Commission.

Sec. 2. The Commission shall hear and determine, according to law, existing claims against the United States arising out of the taking by the United States of possession or control of any of the motor-carrier transportation systems described in Executive Order Number 9462, dated August 11, 1944 (C. F. R., 1944 Supp., p. 70). The settlement of any claim prior to the enactment of this Act shall not prevent the Commission from hearing and determining such claim if it determines that the principles of equity as administered by the Courts require that such settlement be set aside and that such claim be heard and determined.

Sec. 3. The Commission shall consist of a Chairman and two other members, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall each receive a salary of $15,000 per year. At least two of such members shall be learned in the law. [fol. 126] Each member shall take an oath to support the Constitution of the United States, and to discharge faithfully the duties of his office. The members shall hold office until the dissolution of the Commission as hereinafter provided. Vacancies shall be filled in the same manner as the original appointments. Two members shall constitute a quorum, and the agreement of two members shall be necessary to any and all determinations for the transaction of the business of the Commission, and if there be a quorum, no vacancy shall impair or affect the business of the Commission, or its determinations.

Sec. 4. The Commission shall appoint a clerk and such other employees as shall be requisite to conduct the busi-

ness of the Commission. All such employees shall take oath for the faithful discharge of their duties and shall be under the direction of the Commission in the performance thereof.

Sec. 5. The Commission shall meet at such time and places as it my prescribe, shall keep a full written record of all its hearings and proceedings which shall be open to public inspection, and shall have power to establish its rules of procedure.

Sec. 6. The Commission shall receive claims for a period of six months after the date of enactment of this Act, and not thereafter. The jurisdiction of the Commission over claims presented to it as provided in section 2 of this Act shall be exclusive; but nothing in this Act shall prevent any person who does not elect to present his claim to the Commission from pursuing any other remedy available to him. The Attorney General or his assistants shall represent the United States in all claims presented to the Commission.

[fol. 127] Sec. 7. Any member of the Commission or any employee of the Commission, designated in writing for the purpose by the Chairman, may administer oaths and examine witnesses. Any member of the Commission may require by subpena (1) the attendance and testimony of witnesses, and the production of all necessary books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing; or (2) the taking of depositions before any designated individual competent to administer oaths under the laws of the United States or of any State or Territory. In the case of a deposition, the testimony shall be reduced to writing by the individual taking the deposition or under his direction and shall be subscribed by the deponent. In taking oral testimony, opportunity shall be given for cross-examination, under such regulations as the Commission may prescribe. Witnesses subpenaed to testify or whose depositions are taken pursuant to this Act, and the officers or persons taking the same, shall severally be entitled to the same fees and mileage as are paid for like services in the Courts of the United States.

Sec. 8. The final determination of the Commission shall be in writing, shall be filed with its clerk, and shall include

(1) its findings of the facts upon which its conclusions are based; (2) a statement (a) whether there are any just grounds for relief of the claimant and, if so, the amount thereof; (b) whether there are any allowable offsets, counterclaims, or other deductions, and, if so, the amount thereof; and (3) a statement of its reasons for its findings and conclusions.

[fol. 128] Sec. 9. (a) When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in the manner and form as directed by the Commission. Such determination shall be subject to review in the same manner as is provided for cases in the Court of Claims upon application to the Supreme Court within three months from the date of the filing of such determination with the clerk.

Sec. 10. In each claim after the proceedings have been finally concluded, the Commission shall promptly submit its report to Congress.

The report to Congress shall contain (1) the final determination of the Commission; (2) a transcript of the proceedings or judgment upon review, if any, with the instructions of the Supreme Court; and (2) a statement of how each Commissioner voted upon the final determination of the claim.

Sec. 11 (a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of, and be paid in the same manner as is provided for, a final judgment of the Court of Claims.

The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

(b) A final determination against a claimant made and reported in accordance with this Act shall forever bar any [fol. 129] further claim or demand against the United States rising out of the matter involved in the controversy.

Sec. 12. The Commission shall determine all claims presented to it as expeditiously as possible, and shall make a report to Congress of its progress not later than the fifteenth of April of each year until its dissolution.

Sec. 13. The existence of the Commission shall terminate at the end of two years after the first meeting of the Commissioner or at such earlier time after the expiration of the six months' period of limitation set forth in section 6 hereof as the Commission shall have made its final report to Congress on all claims filed with it. Upon its dissolution the records of the Commission shall be delivered to the Archivist of the United States.

Approved July 2, 1948.

2. The Act of August 13, 1948, 62 Stat. 1289, 1290, substituted "nine months" for "six months" in Sections 6 and 13.

3. The Act of May 24, 1949, 63 Stat. 80 (Pub. L. 71, 81st Cong., 1st Sess.) substituted "fifteen months" for "nine months" in Sections 6 and 13.

[fol. 130] EXHIBIT 6-F TO STIPULATION OF FACTS

BEFORE THE MOTOR CARRIER CLAIMS COMMISSION

No. 32

GILLETTE MOTOR TRANSPORT, INC., Dallas, Texas, Claimant,

vs.

THE UNITED STATES.

Claim

The above named Claimant, as and for a claim against the United States, states and alleges:

I

This claim is filed with the Motor Carrier Claims Commission, pursuant to Congressional Act of July 2, 1948, (Public Law 880), without waiving the Claimant's right of election to withdraw said claim at any time prior to hearing and final determination thereof.

II

That Claimant at all times herein referred to was owner of a motor common carrier transportation system and prop-

erties, operated in or incidental to interstate and/or intrastate commerce.

III

That on August 11, 1944, the President of the United States, by Executive Order No. 9462, copy of which is hereto annexed marked Exhibit I, and by reference made [fol. 131] a part hereof, authorized and directed the Director of the Office of Defense Transportation, to take possession and assume control of, and to operate, or arrange for the operation of, the motor carrier transportation system of the above Claimant.

IV

That the Director of the Office of Defense Transportation on August 11, 1944, acting pursuant to said Executive Order No. 9462, did seize and take possession and control of the motor carrier transportation system of the above named Claimant, including all real and personal property and other assets, both tangible and intangible, used in connection with Claimant's transportation system; that notice of such seizure by the United States, and the assumption of possession and control of Claimant's properties, was given to Claimant by written notice designated Notice and Order Establishing Federal Possession and Control and Appointing Federal Manager, a copy of which is hereto annexed marked Exhibit II, and by reference made a part hereof.

V

That the United States possessed, controlled, used and operated the motor carrier transportation system of the Claimant, including all real and personal property and other assets, both tangible and intangible, for needful war purposes, from said date of seizure, August 11, 1944, until June 15, 1945, on which latter date possession, control and use of Claimant's property by the United States was terminated and relinquished; that Notice and Order of Termina- [fol. 132] tion of possession, control, use and operation of Claimant's property by the United States was given in writing by the Director of the Office of Defense Transportation to the above named Claimant, prior to the effective date of such termination and relinquishment.

VI

That the seizure of Claimant's transportation system and properties, as aforesaid, and the possession, control, use and operation thereof for needful war purposes by the United States, constituted a taking of Claimant's property for public use, and that by reason thereof the above named Claimant is entitled to the payment of just compensation by the United States, and claim therefor is hereby made as hereinafter enumerated with particularity.

[fol. 133]

VII

That the properties of Claimant seized, possessed, controlled, used and operated by the United States for needful war purposes, as aforesaid, included real estate, motor trucks, tractors and trailers, business office equipment, shop and garage maintenance equipment, freight warehouse equipment, operating certificates, permits, rights and franchises granted by the Interstate Commerce Commission and/or State Regulatory Commissions, and other property of the Claimant; that demand is hereby made by the above named Claimant upon the United States for the payment of just compensation for the taking, possession, use and operation of said properties by the United States, for war purposes, on the basis of a reasonable rental for said properties during the period of such Government use and operation thereof, as hereinafter in this paragraph enumerated:

(Here follows 1 Photolithograph)

	Kind of Property		Reasonable Rental Value
(a)	Real Estate		$ 10100.00
(b)	Motor trucks, truck-tractors and trailers used in inter-city highway service	34348.3 mi. @ 10¢	$ 3434.83
(c)	Motor trucks used in intra-city pickup and delivery service	1084 Days hire. @ $4.00 per Day.	$ 2833.00
(d)	Business office equipment	@ $ 70.00 per month	$ 707.00
(e)	Shop and garage maintenance equipment	@ $ 300.00 per month	$ 3030.00
(f)	Freight warehouse equipment	@ $ 200.00 per month	$ 2020.00
(g)	Operating certificates, permits, rights and franchises		$ 9856.80

[fol: 134]

VIII

That the United States, during the period of use and operation of Claimant's various properties, as aforesaid, used, operated and managed said properties at a financial profit in the sum of $4368.44, and that upon termination and relinquishment of possession and control by the United States, as aforesaid, such profit constituted a part of the assets and properties returned to the Claimant upon termination of possession, control and use of Claimant's properties by the United States, and by reason thereof the United States is entitled to an offset and credit upon the total demand herein made by this claimant.

IX

That the United States, as a condition procedent to the release and relinquishment by it of possession and control of Claimant's properties, and prior to returning such properties to Claimant, required that Claimant pay, or agree to pay to certain over-the-road truck drivers, money in accordance with a certain Order of the National War Labor Board retroactive in its application and referring to services performed by said drivers during a period preceding the Government seizure of Claimant's properties, to-wit: from November 15, 1943 to August 11, 1944; that Claimant did, by reason of such demand and requirement by the United States, pay the sum of $2118.16 to said drivers, which Claimant otherwise would not have paid, and Claimant does hereby demand payment of said sum by the United States.

[fol. 135]

X

That during the period of possession, control and use by the United States of Claimant's physical properties, as aforesaid, such physical properties were worn and depreciated in value in excess of normal wear and tear and reasonable and ordinary depreciation, resulting in an excessive depreciation in value of said physical properties between said date of seizure and the date of termination and relinquishment of possession, control and use by the United States; that such loss of value and excessive depreciation was in the amount of $85870.57, demand for pay-

ment of which is hereby made upon the United States by the above named Claimant.

XI

That in addition to the foregoing claim for compensation, loss and damage, Claimant sustained other loss and damage as the direct result of Government seizure, possession, control and use of his transportation system and properties, the exact amount of which is undetermined at the time of filing this claim, and Claimant does hereby give notice of his intention to file an amended claim at a later date, wherein such additional loss and damage will be stated with particularity, and demand for payment of the same by the United States is hereby made.

Wherefore, Claimant prays that an award be made and entered by this Commission in favor of Claimant and against the United States in the total sum of $576227.39, together with interest thereon as provided by law; that [fol. 136] Claimant have such other and further relief as may be deemed fair and equitable in the premises.

Dated this 22nd day of September, 1949.

R. G. May, Attorney for Claimant. 316 Security Bank Bldg., Sioux Falls, South Dakota.

Exhibit 7-G to Stipulation of Facts

Notice

At 12:01 a.m. on August 12, 1944, possession of the properties of this transportation system was taken by the United States under authority of the President's Executive Order dated August 11, 1944, and Notice and Order of the Director of the Office of Defense Transportation of the same date.

Attention of all persons affected is directed to the following provisions of Section 6, of the War Labor Disputes Acts:

"Whenever any plant, mine, or facility is in the possession of the United States, it shall be unlawful for any person (1) to coerce, instigate, induce, conspire with, or

encourage any person, to interfere, by lock-out, strike, slow-down, or other interruption, with the operation of such plant, mine, or facility, or (2) to aid any such lock-out, strike, slow-down, or other interruption interfering with the operation of such plant, mine, or facility by giving direction or guidance in the conduct of such interruption, [fol. 137] or by providing funds for the conduct or direction thereof or for the payment of strike, unemployment, or other benefits to those participating therein. No individual shall be deemed to have violated the provisions of this section by reason only of his having ceased work or having refused to continue to work or to accept employment.

"Any person who willfully violates any provision of this section shall be subject to a fine of not more than $5,000, or to imprisonment for not more than one year, or both."

A copy of this notice shall be posted by each carrier in the principal place of business or headquarters of its transportation system and in each terminal maintained in connection with its operations.

Ellis T. Longenecker, Federal Manager of Motor Carrier Transportation Systems and Properties.

EXHIBIT 8-H TO STIPULATION OF FACTS

September 10, 1945

Mr. Ellis T. Longenecker,
Federal Manager of Motor Carriers,
Transportation Systems & Properties,
320 Hodgson Building,
Minneapolis, Minnesota

DEAR SIR:

It has come to our attention that in your capacity as Federal Manager you have been endeavoring to [fol. 138] make final financial settlements with certain of the carriers belonging to this association, preparatory to the Office of Defense Transportation releasing said carriers from federal seizure. We are further informed that

thus far no uniformity has prevailed in attempting to secure such settlements and that pressure is being brought to bear on individual carriers to waive any claim which they may have against the government by reason of the existing seizure.

It is the opinion of the group of operators subject to the seizure that a continuation of the program already undertaken by your office will necessarily result in recourse to the Courts in this situation which would involve the institution of upwards of 100 lawsuits with attendant expense, delay, uncertainty and general demoralization of the industry, all of which can only result in detriment to all parties concerned including the public.

In view of the foregoing situation we respectfully ask that you give consideration to the following orderly procedure for the handling of the matters here involved, which procedure we believe will prove equitable to the government, equitable to the carriers, thereby avoiding any unnecessary and embarrassing action on the part of anyone, all at the expense of the public.

1. That through proper channels you request the President of the United States to issue an Executive Order amending the certain original Executive Order, dated August 11, 1944, under which you are operating, in such a manner that all advances of money or otherwise made by your office shall not be repayable before the time of final determination by settlement or adjudication of the claims [fol. 139] of the cariers for just compensation by reason of the government action in taking over the property of the carriers. This amendatory order should make specific provisions for the following:

(a) Advances in cash that have thus far been made to the carriers.

(b) Advances in cash that will be necessary in the future in order that those common carriers may again conduct their businesses free of government control.

(c) Supplies and equipment of all kinds that have thus far been placed in operation on the lines physically taken over by your office and to which supplies and equipment the government has retained title.

(d) Supplies and equipment of all kinds that must be placed in operation to enable the common carriers to resume normal operations when freed from government control.

2. That there be created an advisory board for the purpose of establishing a formula to be used in determining the just compensation due the carriers as a result of the seizure. This board shall consist of three (3) men, persons of known integrity and ability, and free from prejudice of any kind, which board shall hold hearings before which all parties will be heard. The findings of such board shall be available to all parties and be in such form as to make the amount of each claim easily determinable by the application of the formula established for each type of claim.

[fol. 140] 3. The establishment of an orderly procedure for the return of the lines taken over physically by your office, which should include

(a) At least four (4) weeks prior to the return of the properties by the Office of Defense Transportation your office shall furnish to the carriers involved copies of the inventories and appraisals which your office took as a result of the physical seizures.

(b) A joint inventory to be made as of the date of the return to the carriers of their properties thus seized.

(c) The properties to be returned two (2) weeks, or some other reasonable period after agreement so to do has been reached.

4. Further with regard to the establishment of an orderly procedure for the consideration of claims of all carriers, such claims shall be settled in the following manner: all manner of claims based upon the formula to be established by the above mentioned advisory board shall be settled, insofar as possible, by direct negotiations between the carriers involved and accredited government representatives on the basis of that formula. Those items which cannot be settled through such direct negotiations shall be referred to the above mentioned impartial advisory board and the findings of such board, if not satisfactory to the carrier, will then be presented without prejudice to the proper Court having jurisdiction for final disposition.

We have given this suggested plan of procedure a great [fol. 141] deal of consideration. We believe it to be as fair and equitable and as practical as can be devised. The plan has been used and is taken from the various methods used by your and other departments of government in establishing claims in an orderly manner during the war. Such advisory committee as suggested was used by the War Shipping Administration, which advisory board held hearings in November 1943 in determining a just compensation formula for general use and guidance of the War Shipping Administration. The amended executive order here suggested was used in connection with the T. P. & W. Railroad, more specifically contained in executive order No. 9320. The other sections of our recommendations are taken from other procedures established by the government in other matters of this kind, and we believe further that the procedure established in these other matters involving just compensation are sound and just and can be applied fairly in these cases. We most earnestly urge that you adopt these suggestions in order that the return of these properties can be handled as quickly and as orderly as possible and in order that the public service now being performed by these carriers may be preserved for the public good in the most economical manner.

A copy of this letter is being mailed to each member of Congress from the eight states in which carriers involved operate.

Yours very truly, Midwest Operators Association.
/s/ R. H. May, General Counsel.

RGM:AB

[fol. 142] Exhibit 9-I to Stipulation of Facts

S. 1260

80th Congress, 1st Session

In the Senate of the United States

May 9 (legislative day, April 21), 1947.

Mr. Wilson (for himself, Mr. Reed, Mr. Gurney, Mr. Wherry, Mr. Hickenlooper, Mr. Butler, Mr. Bushfield, Mr. Capper, Mr. Langer, Mr. Young, Mr. Ball, Mr. Thye, Mr.

McCarthy, Mr. Ecton, and Mr. Johnson of Colorado) introduced the following bill; which was read twice and referred to the Committee on the Judiciary.

A Bill

To provide for the settlement and payment to certain motor carriers of claims against the United States for damages resulting from Federal possession, control, and operation in time of war of the carriers' transportation systems and properties; to provide for just compensation to such carriers for the use of such transportation systems and properties during such possession, control, and operation; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President, in the exercise of powers con- [fol. 143] ferred upon him by the Constitution and statutes of the United States, including the Act of August 29, 1916 (39 Stat. 619), having taken possession and assumed control of the motor carrier transportation systems and properties of one hundred and three motor carriers named in a list attached to Executive Order Numbered 9462, dated August 11, 1944, and having operated such systems of transportation in a manner deemed necessary for the successful prosecution of the war, it is hereby declared to be the policy of the United States (1) that just compensation shall be paid by the United States to each of such motor carriers for the use of its properties in the interest of the war effort; (2) that each such motor carrier be compensated for damage sustained by reason of such Federal possession, control, and operation, or arrangement for operation; and (3) that full opportunity be provided for the just and expeditious settlement of all claims with respect to such compensation and damage without the necessity for litigation in any Court of the United States.

Sec. 2. As used in this Act—

(a) The term "motor carrier" means (1) any corporation, association, individual, partnership, or other business entity named in a list attached to and made a part of Executive Order 9462 of the President dated August 11, 1944; and (2) any assignee, transferee, or other successor in interest who as a matter of law has succeeded to and become

the owner of the property and rights of any such corporation, association, individual, partnership, or other business entity, which at any time owned property which at such time was subject to Federal possession, control, and opera-
[fol. 144] tion under the authority of, and for the purposes described in, Executive Order 9462.

(b) The term "period of Federal control" means, with respect to each motor carrier as herein defined, the period between 12:01 ante-meridian August 12, 1944, on the one hand, and the time and date of issuance by the Director of the Office of Defense Transportation of a notice of termination, terminating Federal possession, control, and operation, or arrangement for operation of the systems and properties of such motor carrier, on the other hand.

(c) The term "advance" means cash made available by the Government for disposition by the management of any carrier, or expended by the Government for additions and betterments to the property and system of any carrier, or expended by the Government at the request and for the benefit of the owner of the property in reduction of his indebtedness or for any other purpose whatsoever. The term "net advance" means with respect to any motor carrier, the total of all advances, as above defined, advanced to or expended for the benefit of such carrier, loss such amount of "advances" as have been repaid by the carrier, or by reason of other transactions, have been credited to the carrier in any published accounting statement of the Government.

Sec. 3. Each motor carrier, the transportation systems or properties of which were under Federal possession, control, and operation, or arrangement for operation, pursuant to the provisions of Executive Order Numbered 9462, shall, upon compliance with the conditions hereinafter recited, be entitled—

[fol. 145] (a) as compensation for use of its properties while under operation or arrangement for operation, to an amount equal to (1) the amount of operating deficit, if any, actually sustained in the operation of the systems and properties of any such motor carrier during the period of Federal control, plus (2) an amount sufficient to provide a reasonable profit from the operation of the systems and

properties of such motor carriers for the period of Federal control. For purposes of this section, profit of any motor carrier for any stated period shall be deemed reasonable if equal to or greater than the profit which would have been realized if the operating expenses of the carrier for such period had been 93 per centum of its actual operating revenue; and

(b) as full compensation for all damages sustained by reason of Federal possession, control, and operation or arrangement for operation of its systems and properties, to an amount equal to 10 per centum of the amount of operating expenses actually incurred during the period of Federal control.

Sec. 4. Within one hundred and twenty days after the enactment of this Act, the Interstate Commerce Commission, hereinafter referred to as the "Commission", shall make a determination of the amount to which each motor carrier is entitled under this Act, and notify such motor carrier, in writing of the amount so determined and the method of computation of such amount.

(a) Within twenty days after the receipt of such notice, such motor carrier may file with the Commission an acceptance of such determination together with a waiver, [fol. 146] in form prescribed by the Commission, of all claims against the United States arising from, or incidental to, Federal possession, control, and operation or arrangement for operation of its properties; and upon such filing shall become entitled to receive the amount so determined by the Commission. Upon receipt of such acceptance and waiver, the Commission shall certify the amount of its determination to the Secretary of the Treasury for payment, and the Secretary of the Treasury shall make payment of such amount to the motor carrier entitled thereto, from the appropriation authorized by section 9 of this Act.

(b) If any motor carrier desires to avail itself of the benefits of this section but is not satisfied that the determination of the Commission is consistent with the requirements of this Act, such motor carrier, within twenty days after receipt of the Commission's notice, may file a waiver of all claims against the United States arising from or incidental to Federal possession, control, and operation or

arrangement for operation of its properties and in addition thereto an objection in writing to the method or result of the computation on which the determination of the Commission is based. Such carrier thereupon shall be given reasonable opportunity for oral or written presentation to the Commission of its reasons for such objections, and the Commission within a reasonable time after such presentation shall make such further determination as circumstances in its judgment require. If the motor carrier then files an acceptance of such further determination of the Commission, the Commission shall certify the amount of such fur- [fol. 147] ther determination to the Secretary of the Treasury for payment, and the Secretary of the Treasury shall make payment in such amount to the motor carrier entitled thereto from the appropriation authorized by section 9 of this Act. If such carrier considers the further determination of the Commission to be inconsistent with the provisions of his Act, such carrier, notwithstanding the waiver it has executed, may file a petition in the Court of Claims for the purpose of determining the amount of compensation for use of or damage to its properties on the basis established by this Act; and jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and render judgment with respect to such claim set forth in such petition and on such basis. Any judgment entered with respect to such claim shall be certified to the Secretary of the Treasury for payment in the same manner as its judgments are otherwise certified to the Congress, except that payment of the amount thereof shall be from the appropriation authorized by section 9 of this Act.

(c) Payments made in accordance with this section shall not be subject to review by any officer, agency, or employee of the United States other than those particularly designated herein.

Sec. 5. The method of determining the gross revenue, operating expense, net income or operating deficit of any such motor carrier, for the purposes of this Act, shall be in accordance with generally accepted accounting practices, and, insofar as practicable, shall be consistent with the uniform system of accounting prescribed by the Commission for motor carriers for the year 1945. Where reports of a motor carrier are customarily prepared on a monthly,

[fol. 148] quarterly, or annual basis, revenues and operating expenses for a fractional part of the period for which such reports are customarily prepared may be determined by prorating the reported revenues and expenses on a workday basis.

Sec. 6. Each motor carrier with respect to which the Commission is required to make a determination under section 3 of this Act, shall, upon the request of the Commission furnish such information under oath as may be necessary for the determinations required by section 4 of this Act.

Sec. 7. Any net advance as hereinbefore defined, shall be offset against the amount to which any motor carrier would otherwise be entitled under section 3 hereof; but if any such net advance is in excess of the amount to which such motor carrier would otherwise be entitled, no remedy shall be available to the United States or any agency thereof to effect collection or other recovery from such motor carrier of such excess, notwithstanding any other provision of law.

Sec. 8. Nothing in this Act shall be construed as requiring any motor carrier (other than a motor carrier which has waived claims against the United States as a condition of receiving the benefits provided by section 3 hereof) to accept as an exclusive remedy the payment of compensation for use or damages of any amount determined by the Commission under section 4 hereof. Motor carriers which have not signed such waivers may, at their election, pursue any other remedy for the recovery of compensation for use or [fol. 149] damages arising from Federal Possession and control as is otherwise permitted by law. Rights to the benefits provided by section 3 hereof shall not be waived, nullified or otherwise affected by any waiver of claims against the United States which may have been executed by any motor carrier prior to the enactment of this Act.

Sec. 9. There is hereby authorized to be appropriated, such sums as may be necessary to carry out the purposes and provisions of this Act, and to make payments provided for herein.

EXHIBIT 10-J TO STIPULATION OF FACTS

From Edward J. Devitt, Member of Congress, 4th Dist. (Ramsey Co.), Minn.

80th Congress, 1st Session

H. R. 4205

In the House of Representatives

July 15, 1947

Mr. Devitt introduced the following bill; which was referred to the Committee on the Judiciary.

A Bill

To provide for the settlement and payment to certain motor carriers of claims against the United States for damages resulting from Federal possession, control, and [fol. 150] operation in time of war of the carriers' transportation systems and properties; to provide for just compensation to such carriers for the use of such transportation systems and properties during such possession, control, and operation; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President, in the exercise of powers conferred upon him by the Constitution and statutes of the United States, including the Act of August 29, 1916 (39 Stat. 619), having taken possession and assumed control of the motor carrier transportation systems and properties of one hundred and three motor carriers named in a list attached to Executive Order Numbered 9462, dated August 11, 1944, and having operated such systems of transportation in a manner deemed necessary for the successful prosecution of the war, it is hereby declared to be the policy of the United States (1) that just compensation shall be paid by the United States to each of such motor carriers for the use of its properties in the interest of the war effort: (2) that each such motor carrier be compensated for damage sustained by reason of such Federal possesion, control, and operation, or arrang ment for operation; and (3) that

full opportunity be provided for the just and expeditious settlement of all claims with respect to such compensation and damage without the necessity for litigation in any Court of the United States.

Sec. 2. As used in this Act—

(a) The term "motor carrier" means (1) any corporation, association, individual, partnership, or other business [fol. 151] entity named in a list attached to and made a part of Executive Order 9462 of the President dated August 11, 1944; and (2) any assignee, transferee, or other successor in interest who as a matter of law has succeeded to and become the owner of the property and rights of any such corporation, association, individual, partnership, or business entity; and (3) any corporation, association, individual, partnership, or other business entity which at any time owned property which at such time was subject to Federal possession, control, and operation under the authority of, and for the purposes described in, Executive Order 9462.

(b) The term "period of Federal control" means, with respect to each motor carrier as herein defined, the period between 12:01 antemeridian August 12, 1944, on the one hand, and the time and date of issuance by the Director of the Office of Defense Transportation of a notice of termination, terminating Federal possession, control, and operation, or arrangement for operation of the systems and properties of such motor carrier, on the other hand.

(c) The term "advance" means cash made available by the Government for disposition by the management of any carrier, or expended by the Government for additions and betterments to the property and system of any carrier, or expended by the Government at the request and for the benefit of the owner of the property in reduction of his indebtedness or for any other purpose whatsoever. The term "net advance" means, with respect to any motor carrier, the total of all advances, as above defined, advanced to or expended for the benefit of such carrier, less such amount [fol. 152] of "advances" as have been repaid by the carrier, or by reason of other transactions, have been credited to the carrier in any published accounting statement of the Government.

Sec. 3. Each motor carrier, the transportation systems or properties of which were under Federal possession, control, and operation, or arrangement for operation, pursuant to the provisions of Executive Order Numbered 9462, shall, upon compliance with the conditions hereinafter recited, be entitled—

(a) as compensation for use of its properties while under operation or arrangement for operation, to an amount equal to (1) the amount of operating deficit, if any, actually sustained in the operation of the systems and properties of any such motor carrier during the period of Federal control, plus (2) an amount sufficient to provide a reasonable profit from the operation of the systems and properties of such motor carriers for the period of Federal control. For purposes of this section, profit of any motor carrier for any stated period shall be deemed reasonable if equal to or greater than the profit which would have been realized if the operating expenses of the carrier for such period had been 93 per centum of its actual operating revenue; and

(b) as full compensation for all damages sustained by reason of Federal possession, control, and operation or arrangement for operation of its systems and properties, to an amount equal to 10 per centum of the amount of operating expenses actually incurred during the period of Federal control.

[fol. 153] Sec. 4. Within one hundred and twenty days after the date of enactment of this Act, the Interstate Commerce Commission, hereinafter referred to as the "Commission", shall make a determination of the amount to which each motor carrier is entitled under this Act, and notify such motor carrier, in writing, of the amount so determined and the method of computation of such amount.

(a) Within twenty days after the receipt of such notice, such motor carrier may file with the Commission an acceptance of such determination together with a waiver, in form prescribed by the Commission, of all claims against the United States arising from, or incidental to, Federal possession, control, and operation or arrangement for operation of its properties; and upon such filing shall become entitled to receive the amount so determined by the Com-

mission. Upon receipt of such acceptance and waiver, the Commission shall certify the amount of its determination to the Secretary of the Treasury for payment, and the Secretary of the Treasury shall make payment of such amount to the motor carrier entitled thereto, from the appropriation authorized by section 9 of this Act.

(b) If any motor carrier desires to avail itself of the benefits of this section but is not satisfied that the determination of the Commission is consistent with the requirements of this Act, such motor carrier, within twenty days after receipt of the Commission's notice, may file a waiver of all claims against the United States arising from or incidental to Federal possession, control, and operation or arrangement for operation of its properties and in addition thereto an objection in writing to the method or result [fol. 154] of the computation on which the determination of the Commission is based. Such carrier thereupon shall be given reasonable opportunity for oral or written presentation to the Commission of its reasons for such objections, and the Commission within a reasonable time after such presentation shall make such further determination as circumstances in its judgment require. If the motor carrier then files an acceptance of such further determination of the Commission, the Commission shall certify the amount of such further determination to the Secretary of the Treasury for payment, and the Secretary of the Treasury shall make payment in such amount to the motor carrier entitled thereto from the appropriation authorized by section 9 of this Act. If such carrier considers the further determination of the Commission to be inconsistent with the provisions of this Act, such carrier, notwithstanding the waiver it has executed, may file a petition in the Court of Claims for the purpose of determining the amount of compensation for use or damage to its properties on the basis established by this Act; and jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and render judgment with respect to such claim set forth in such petition and on such basis. Any judgment entered with respect to such claim shall be certified to the Secretary of the Treasury for payment in the same manner as its judgments are otherwise certified to the Congress, ex-

cept that payment of the amount thereof shall be from the appropriation authorized by section 9 of this Act.

(c) Payments made in accordance with this section shall not be subject to review by any officer, agency, or employee [fol. 155] of the United States other than those particularly designated herein.

Sec. 5. The method of determining the gross revenue, operating expense, net income or operating deficit of any such motor carrier, for the purposes of this Act, shall be in accordance with generally accepted accounting practices, and, insofar as practicable, shall be consistent with the uniform system of accounting prescribed by the Commission for motor carriers for the year 1945. Where reports of a motor carrier are customarily prepared on a monthly, quarterly, or annual basis revenues and operating expenses for a fractional part of the period for which such reports are customarily prepared may be determined by prorating the reported revenues and expenses on a workday basis.

Sec. 6. Each motor carrier with respect to which the Commission is required to make a determination under section 3 of this Act, shall, upon the request of the Commission furnish such information under oath as may be necessary for the determinations required by section 4 of this Act.

Sec. 7. Any net advance as hereinbefore defined, shall be offset against the amount to which any motor carrier would otherwise be entitled under section 3 hereof; but if any such net advance is in excess of the amount to which such motor carrier would otherwise be entitled, no remedy shall be available to the United States or any agency thereof to effect collection or other recovery from such motor carrier of such excess, notwithstanding any other provision of law.

[fol. 156] Sec. 8. Nothing in this Act shall be construed as requiring any motor carrier (other than a motor carrier which has waived claims against the United States as a condition of receiving the benefits provided by section 3 hereof) to accept as an exclusive remedy the payment of compensation for use or damages of any amount determined by the Commission under section 4 hereof. Motor carriers which have not signed such waivers may, at their election, pursue any other remedy for the recovery of compensation

for use or damages arising from Federal possession and control as is otherwise permitted by law. Rights to the benefits provided by section 3 hereof shall not be waived, nullified, or otherwise affected by any waiver of claims against the United States which may have been executed by any motor carrier prior to the enactment of this Act.

Sec. 9. There is hereby authorized to be appropriated such sums as may be necessary to carry out the purposes and provisions of this Act, and to make the payments provided for herein.

80th Congress, 1st Session

H. R. 4205

A Bill

To provide for the settlement and payment to certain motor carriers of claims against the United States for damages resulting from Federal possession, control, and operation in time of war of the carriers' transportation [fol. 157] systems and properties; to provide for just compensation to such carriers for the use of such transportation systems and properties during such possession, control, and operation; and for other purposes.

By Mr. Devitt.

July 15, 1947

Referred to the Committee on the Judiciary.

EXHIBIT NO. 11-K TO STIPULATION OF FACTS

House Report No. 2182:

Object of Bill

The bill would establish a Motor Carrier Claims Commission for the purpose of hearing and determining claims by 103 motor freight lines for the use, rents, losses, and damages sustained by them on account of the seizure, use and operation of their properties during the World War II.

Factual Background

The motor freight carriers affected hauled approximately three-fourths of the motor freight in a 12-state Midwest area generally west and south of Chicago. For some time prior to 1944 these carriers were experiencing difficulty in meeting the excessive demands for higher pay made by the labor unions of which their operative personnel were members. Despite the fact that capitulation to [fol. 158] these demands would have spelled financial disaster in many cases, the War Labor Board on February 7, 1944, ordered a substantial wage increase. The carriers did not comply with the order and, on August 4, 1944, the unions struck.

On August 11, 1944, the Government issued Executive Order 9462 directing that the properties be seized, used, and operated by the Government. The ODT was directed to execute the order and, on the same date, a Federal manager was appointed to take possession and control of the carriers. The Federal manager was authorized to manage or operate, or arrange for the management or operation of the carrier system.

The Federal manager took possession of the properties on August 11, 1944, and issued an operations order No. 1 ordering the carriers to resume operations. The carriers obeyed the order under protest. Within a brief period the Federal manager had discharged the owners of 8 of the 103 carriers and replaced them with Federal employees. Upon taking possession the Federal manager raised wages, took charge of labor relations and grievances, supervised freight-rate matters, froze all properties, so as to prohibit their sale, transfer, or further encumbrance, and exercised other indicia of control.

It was the announced intention of the Federal manager upon his assumption of control to release the carriers gradually from control upon the meeting of certain requirements. At least one of the requirements for restoration to private control was an agreement to pay retroactively the [fol. 159] wage increase ordered by the Government for the period from November 15, 1943, to August 11, 1944, prior to the Executive order. Under the conditions prescribed, the various carriers were restored to private

ownership at various times within a period of approximately 15 months after their original seizure.

The Problem

Two questions are presented. First, was there a "taking" of the properties in the legal sense requiring payment of just compensation to the owners under the fifth amendment to the Constitution? Second, if there was a "taking", what is the proper measure of damages? Certain suits are now pending in the Court of Claims brought by some of the affected carriers, and the principal issues presented parallel those stated. The Government contends that legislation is unnecessary and that the decision in one case will settle the issue of "taking" for all cases and will clarify the measure of damages so as to reduce the problem to one of accounting in all similar cases. The carriers contend that this is not so, that each case must rest on its own particular facts, and that what may be true in one case would not necessarily apply in another. They contend that 103 separate actions in the Court of Claims would so congest the docket of that Court as to unduly prolong relief and add to the financial dilemma now confronting equities of all parties concerned.

The Solution

The Committee feels that a blanket indorsement of a "taking" in the legal sense cannot be made upon [fol. 160] its present knowledge of the facts concerning each separate carrier. Therefore, it appears that a logical solution would be, as proposed in the reported bill, for a Motor Carrier Claims Commission to be established to hear and determine these matters. It had been the frequent experience of Congress in the past to create such quasi tribunals for the purpose of disposing of a large number of claims of similar nature all arising from some activity of the Government, and it has been found that often such commissions are able to provide speedy and equitable remedies more efficaciously than those provided through normal channels. The reported bill accordingly establishes a commission, describes its constitution, duration, and mechanics of operation, authorizes it to promulgate regulations, prescribes a period of limitations for acceptance of claims,

provides a method for review of orders, requires reports to Congress, and leaves to its discretion the formulation of measure of damages which will be consistent with the rights and equities of all parties concerned.

EXHIBIT 12-L TO STIPULATION OF FACTS

7

The United States is therefore indebted to R-B Freight Lines, Inc., for rental and damage to and consumption of property in the net amount of $121,860.34.

8

The United States is further indebted to R-B Freight [fol. 161] Lines, Inc. in a sum equivalent to interest at 4% per annum on the sum of $121,860.34 from November 1, 1945 to date of payment, said sum being also a part of just compensation.

Reasons for Findings and Conclusions

The petitioner, R-B Freight Lines, Inc., a motor vehicle common carrier, filed its claim with this Commission under the provisions of the Act creating the Commission (Public Law 880, 80th Congress, 62 Stat. 1222, as amended), and seeks compensation for the alleged taking of its property for public use during the period between August 11, 1944 and November 1, 1945. Petitioner alleges that such taking was done in pursuance of Executive Order 9462 (C.F.R. 1944 Supp., p. 70).

The respondent, the United States, in its defense against this claim makes the following contentions:

I. There was no taking of petitioner's property under the Fifth Amendment to the Constitution, at any time prior to January 1, 1945.

II. Even if there were a Fifth Amendment taking of petitioner's property on August 11, 1944, it was a seizure of petitioner's business as a going concern for which there is no proof of just compensation.

III. On January 1, 1945, respondent took and used petitioner's property and is therefore chargeable with the payment of an amount of just compensation. That amount is less than the sum owed respondent by petitioner.

[fol. 162] I. The Question of Taking

Petitioner, along with other midwestern motor carriers, was for some time prior to August, 1944 involved in wage disputes with the union representing over-the-road drivers. Certain wage increases had been directed by the War Labor Board but petitioner and the other carriers had taken the position that they were financially unable to pay the increased wages and consequently had not complied with the terms of this directive. On August 4, 1944 the drivers struck. On August 11, 1944 the President of the United States signed and issued Executive Order 9462, by which order he directed the Director of the Office of Defense Transportation "to take possession and assume control of, and to operate, or arrange for the operation of the motor carrier transportation systems of the motor carriers named in the list attached hereto and made a part hereof, including all real and personal property and other assets, wherever situated, used or useful in connection with the operation of such systems, in such manner as he may deem necessary for the successful prosecution of the war; and to do anything that he may deem necessary to carry out the provisions and purposes of this order." The Executive Order provided that during his operation of said transportation systems the Director should observe the terms and conditions of the Directive Order of the National War Labor Board, dated February 7, 1944. The Executive Order also contained the following provisions: "3. Except with the prior written consent of the Director, no attachment by mesne process, garnishment, execution, or otherwise shall be levied on or against any of the real or personal property or other assets, tangible or intangible in the possession of the Director hereunder."

[fol. 163] On the same date, August 11, 1944, the Director of the Office of Defense Transportation sent to petitioner a telegram advising that he, the Director, had issued an order taking possession and control as of 12:01 A. M. on August 12, 1944, of petitioner's motor carrier

transportation system and all property used or useful in the operation thereof.

On the same date, August 11, 1944, the Director of the Office of Defense Transportation issued a "Notice and Order Establishing Federal Possession and Control," this order providing in part: "1. You are hereby notified that, by order of the President of the United States (copy of Executive Order attached) possession and control of your motor carrier transportation system, including all real and personal property and other assets, wherever situated, used or useful in connection with the operation of such system, are hereby taken and assumed by me as Director of the Office of Defense Transportation as of 12:01 o'clock A. M. on the twelfth day of August, 1944." By this order the Director also appointed a Federal Manager to possess, control and operate or arrange for the operation of the systems and properties of petitioner and the other carriers named in the Executive Order.

On the same date, August 11, 1944, the Federal Manager issued "Operations Order No. 1," which provided in part: "1. Until further order, you are hereby directed to resume or continue the operation of your motor carrier transportation system in the usual and ordinary manner and course of business, as a going enterprise, in your present corporate partnership, individual, or trade name, as the [fol. 164] case may be, and by means of the instrumentalities, agents, officers, and employees customarily employed by you, as fully as if possession and control had not been taken and assumed by the United States, subject, however, to the terms of said Executive Order and to all general orders, rules, regulations, and directions, which may be issued thereunder." This order also directed compliance with the terms and conditions of the Directive Order of the National War Labor Board, dated February 7, 1944.

It is our opinion that the issuance and service of the above orders and notices constituted a taking by the Government of petitioner's property. The language of the Executive Order is perfectly clear as to the purpose of the Government in taking the action, and its intention that possession and control be taken outright.

The Executive Order itself even provided for some de-

tails of the possession and control to be exercised. It ordered compliance with the National War Labor Board Directors, and forbade the levy of any attachment by mesne process or otherwise on or against any of the property taken.

The telegram sent to plaintiff and the Notice and Order of Possession by their terms leave no doubt whatever as to what was being done. Nothing could be clearer than the statement that "possession and control of your motor carrier transportation system including all real and personal property and other assets wherever situated, used or useful in connection with the operation of such system are hereby taken and assumed by me as Director of the Office of Defense Transportation."

[fol. 165] The Federal Manager, having been appointed by the above Order, issued his Operations Order No. 1. The terms of this order do not admit any question that the possession and control taken and assumed by the Director of the Office of Defense Transportation had been in turn assumed by him, the Federal Manager, acting in behalf of the United States.

Acts done thereafter by the Federal Manager, with reference to the property of the petitioner, not only were consistent with the express terms of the several orders and notices mentioned above, but were not consistent with any other interpretation.

The Federal Manager arranged with petitioner's Secretary and General Manager, George H. Buergi, that Buergi should act as Operating Manager of petitioner's transportation system and properties subject to orders of the Federal Manager. He, the Federal Manager, caused notices to be posted on petitioner's terminal buildings indicating that the United States had taken possession of petitioner's properties; had various Government employees call at petitioner's office from time to time to observe compliance with his orders; determined conditions of employment and fixed the amount of wages to be paid; settled labor disputes; ordered the discharge of certain employees; prescribed accounting methods and procedures, ordering the separation of entries as to transactions before and after 12:01 A.M. August 12, 1944; altered the customary method of handling shortages and overages of freight

shipments, and of handling the interchange of freight between petitioner's system and other carriers; ordered the discontinuance of one of petitioner's routes, terminated and [fol. 166] canceled a contract under which petitioner had transported petroleum products; refused a request by petitioner to release certain pieces of equipment which petitioner desired to leave out; and assumed control of rates and the publication thereof by the Tariff Bureaus.

The Government says that such "interference" as petitioner may have encountered from Government action did not amount to a taking of its property but merely to regulation. To place any such construction on the acts done by the Federal Manager would be to belie the statements contained in the Executive Order and the orders issued thereunder. The Federal Manager could not alter the intention expressed by the President, and could not lessen the effect of the President's Order and the act of the Director of the Office of Defense Transportation in taking possession and control under that Order. Possession and control having been once taken, all things done by the Federal Manager were done by him as the representative of the United States charged with maintaining for the United States its possession and control.

In the United States v. United Mine Workers of America, 330 U.S. 258, the Court said at page 288, "The defendants, however point to the fact that the private managers of the mines have been retained by the Government in the role of operating managers with substantially the same functions and authority. It is true that the regulations for the operation of the mines issued by the Coal Mines Administrator provide for the retention of the private managers to assist in the realization of the objects of Government seizure and operation. The regulations, however, also [fol. 167] provide for the removal of such operating managers at the discretion of the Coal Mines Administrator. Thus the Government, though utilizing the services of the private managers, has nevertheless retained ultimate control.

"The defendants also point to the regulations which provide that none of the earnings or liabilities resulting from the operation of the mines, while under seizure, are for the account or at the risk or expense of the Government; that the companies continue to be liable for all Fed-

eral, State, and local taxes; and that the mining companies remain subject to suit. The regulations on which defendants rely represent an attempt on the part of the Coal Mines Administrator to define the respective powers and obligations of the Government and private operators during the period of Government control. We do not at this time express any opinion as to the validity of these regulations. It is sufficient to state that, in any event, the matters to which they refer have little persuasive weight in determining the nature of the relation existing between the Government and the mine workers."

Justice Black stated with reference to that case at page 329, "The fact that it utilized the managerial forces of the private owners does not detract from the Government's complete authority. For whatever control Government agents delegated to the private managers, those agents had full power to take away and exercise themselves."

The situation described by the Court in the Mine Workers case is substantially the same as existed in the case before us.

[fol. 168] Were there any question as to the "public use" to which petitioner's property was placed, there is certainly no doubt that petitioner was deprived of its own free use of its property. As the Court said in United States v. General Motors Corporation, 323 U.S. 373, at page 378, "The Courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

The respondent places considerable reliance on the case of Marion & Rye Valley Railway Company v. United States, 80 Ct. Cl. 230, which was affirmed by the Supreme Court in 270 U.S. 280. The Court of Claims in that case held that the Marion & Rye Railway Company was not "taken" by the actions of the President and Director General of railroads. It might be noted first that the basis of the affirmance of this decision appears to be contained in the following from the opinion of the Supreme Court at page 282. "We have no occasion to determine whether in law the

President took possession and assumed control of the Marion & Rye Valley Railway. For, even if there was technically a taking, the judgment for defendant was right. Nothing was recoverable as just compensation, because nothing of value was taken from the company; and it was not subjected by the government to pecuniary loss. Nominal damages are not recoverable in the Court of claims." [fol. 169] Referring to the opinion of the Court of Claims, we find this at page 251: "Among those (orders) sent to the plaintiff was general order No. 1, dated December 29, 1917, which is addressed to 'all concerned' and declares that the Director General of Railroads 'has taken possession and assumed control of certain transportation systems described in the proclamation of the President.' The receipt of this order by the plaintiff did not constitute a taking of the plaintiff's property. It did not by its terms signify or state that the property of the plaintiff was being taken possession of. It contained nothing which ousted or tended to oust the property of the plaintiff from its control. There were no instructions in the order which caused the plaintiff to change the management and operation of its property. The plaintiff was not deprived of or circumscribed in any way in the use and enjoyment of its property." The order described in the Marion & Rye Valley Railway Company case is far different from the orders in question here, all of which are quite specific. The notice and order establishing Federal possession and control told petitioner: "You are hereby notified that * * * possession and control of your motor carrier transportation system * * * are hereby taken and assumed * * *." Also, as previously noted, the orders served on petitioner in this case did obtain specific instructions which were later amplified by acts and instructions by the Federal Manager.

When possession was taken, the status then remained fixed until something occurred to restore the property to petitioner. The only way in which the Director of the Office of Defense Transportation could have altered the situation [fol. 170] was by terminating the possession, control and operation of petitioner's transportation system or any part thereof, or any real or personal property when he determined that such possession, control and operation were

no longer necessary for the successful prosecution of the war. This authority was given to the Director by the terms of the Executive Order. But the Director did not so terminate the possession or control of any of petitioner's property until November 1, 1945.

There was but one way in which the Federal Manager could have changed the respective positions of the United States and the petitioner, and that was by returning the property to the petitioner as was authorized by the Order of the Director of the Office of Defense Transportation.

Without deciding whether a termination of possession and control by the Director of the Office of Defense Transportation, or a return of some of petitioner's property by the Federal Manager might have been effected by some less formal method than a written document, we are satisfied from the evidence that nothing occurred which might even suggest an intention to make such termination, release or return, except for the written instruments which have been introduced.

Four documents in the evidence indicate the return of a bus, a truck (which was not petitioner's), a trailer and 7 tires and tubes at various times in February, March and May, 1945. However, there is no evidence that petitioner actually received these items; on the contrary, it does appear from the evidence that the Government still had [fol. 171] all of petitioner's revenue equipment up to the time of final termination of possession and control.

Possession and active control of petitioner's property continued from August 11, 1944, until November 1, 1945, the date on which such possession and control were terminated and relinquished, as shown by a determination and order of the Director of the Office of Defense Transportation dated October 15, 1945. The Government's possession and control during this period was uninterrupted and there was no relaxation or release of such control during said period.

The respondent admits that on January 1, 1945, the Government "* * * took for use as it saw fit each and every item of petitioner's property. It paid all the employees from its own funds; it registered the revenue equipment as Government held property; it sought and obtained exemption from the payment of taxes; it took

into its actual possession the revenues earned and disposed of them as its own property."

The event which brought about what the respondent treats as a different situation on January 1, 1945, was the replacement of Buergi as Operating Manager by order of the Federal Manager. We do not think there was any change in the respective positions of Government and petitioner on that date. The Government was already in possession of petitioner's property, and so continued. It took nothing on January 1 which it did not already hold. There was no new Executive Order, and no new notice from the Director of the Office of Defense Transportation. The taking was as complete on August 12 as it was on January [fol. 173] 1. The replacement of the Operating Manager was not an act of "taking," but was simply one of the most significant of a series of acts by the Federal Manager, all of which plainly indicated that he was in full control for the Government.

All of the things done by respondent after January 1, 1945 could have been done as well before that date. None of such acts amounted to any more than the placing in effect of certain administrative decisions made during the terms of respondent's possession and control.

Respondent advances a theory that the take-over of petitioner's property on August 11, 1944, was not one for which compensation is due, but that it might be considered in the same light as an operating receivership or conservatorship. While receivership is a familiar judicial proceeding, we do not know of any authority for such a proceeding by the Executive. Even assuming the authority, the expressed purposes of the Executive Order cannot be changed after the directions of the order have been fully carried out. We do not think, therefore, that this suggestion of the Government can be accepted.

II. What Was Taken

The respondent insists that if the Government took anything on August 11, 1944, such taking was of the petitioner's "business as a going concern" as distinguished from the individual items of tangible and intangible prop-

erty belonging to petitioner, and that no proof has been offered of the rental value of such "business as a going concern."

[fol. 173] We have determined that petitioner's property was taken at 12:01 A.M., August 12, 1944, and that it was possessed and controlled for public use by the Government from that time forward, as completely as was the case on or after January 1, 1945, on which latter date respondent admits that it took for use as it saw fit each and every item of petitioner's property.

If the term "business as a going concern" could be construed as something separate and apart from petitioner's other property, we are still unable to see how such a "business" could have been taken and used without a simultaneous taking of the property which was necessary to the use and operation of that "business."

If, on the other hand, the term "business as a going concern" is an all-inclusive term, there could have been no taking of such a business without the taking of all its component parts.

However, speculation on the meaning of the term is unnecessary. The Executive Order and the Notice and Order of Possession and Control leave no room for doubt as to what the Government took. Both documents call for the taking of possession and assumption of control of petitioner's motor carrier transportation system, "including all real and personal property and other assets, whatever situated, used or useful in connection with the operation of such system." The telegram reads, "* * * And all real and personal property. * * *" (Emphasis supplied.)

[fol. 174] We therefore conclude that as of 12:01 A.M., August 12, 1944, the Government took possession and control of all of petitioner's property, including each and every item used or useful in connection with the operation of its transportation system.

The fact that the Government chose to use petitioner's property in the same business as was previously conducted by petitioner does not in any way alter the effect of the act of taking. If the Government had decided to close petitioner's offices and place its vehicles in storage, there would have been no less of a taking, nor would the petitioner's

right to compensation have been impaired or diminished. We find that petitioner was deprived of its property and of the right to determine what use should be made of it. We cannot presume that petitioner could only have carried on the same business. In fact, it was already investigating the possibility of more profitable uses for its equipment. The take-over of what might be the best use of any piece of petitioner's property.

III. Compensation

To fix the "just compensation" to which petitioner is entitled for the taking of its properties, we undertake to determine the value of the property on the date of the taking, August 11, 1944. This is to be determined as the fair market value, based not upon what the Government gained by the taking and use of the property, but rather upon what the petitioner lost in this property. United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53; Boston Chamber of Commerce v. City of Boston, 217 U.S. 189.

A. Rental

[fol. 175] Both the petitioner and the respondent have advanced the principle that in a case of taking for temporary use the normal measure of just compensation is the fair rental value of the property so taken and used. The authorities support this proposition and we accept it as governing in this case. United States v. General Motors Corporation, supra; United States v. Petty Motor Co., 327 U.S. 372; Kimball Laundry Co. v. United States, 338 U.S. 1.

We again refer to the position taken by respondent. Respondent concedes that on January 1, 1945, it took and used petitioner's property and is therefore chargeable with the payment of an amount of just compensation. It contends, however, that, if there were a taking of petitioner's property on August 11, 1944 (which is denied), it was a seizure of petitioner's business as a going concern, for which there was no proof of just compensation. It seems that the rental value of petitioner's business, including all its property, should not be less, even if treated as a going concern, than the total rental of its component parts. But it is to be borne in mind that upon the Government's taking on August 11,

1944, petitioner was deprived of property which it had no obligation to continue to use in the common carrier business. It was considering other possible uses which it deemed more profitable. Petitioner's Board of Directors had determined, after the driver's strike began, to make all necessary plans for liquidation of the business or for possible Government seizure. Thus the petitioner, in being deprived of its property, was deprived of the right to determine what use should be made of its property. The Government points out (on authority of United States v. Toronto, Hamilton [fol. 176] and Buffalo Navigation Co., 338 U.S. 396) that the question is not what the owner claims he might do with his property; but one of the use which a reasonable man would adapt. We think that this does not alter the applicability of the principle that consideration should be given to uses to which property is adaptable and can reasonably be expected to be needed, and that the determination should be of fair market value based on such use, which in this case would be fair market rental value. Mississippi and Rum River Boom Co. v. Patterson, 98 U.S. 403.

The market price of the property taken is just compensation. The market value in the case of the taking of the fee is the sum which probably would be arrived at as a result of fair negotiations by an owner willing to sell and a purchaser willing to buy, after due consideration of all elements reasonable affecting value. Olson v. United States, 292 U.S. 246. As applied to the taking of temporary use of property, the market value is the sum which probably would be arrived at in the same manner by a willing lessor and a willing lessee, Kimball Laundry Co. v. U.S. supra.

As pointed out above, petitioner's transportation system and all of its property used or useful therein were taken on August 11, 1944. Evidence has been adduced to show the rental value of petitioner's revenue equipment (vehicles) and office equipment.

During the war period, including the time of the seizure of petitioner's property, there was a critical shortage of vehicular equipment of all types. We are satisfied, from the evidence, that there existed a great demand for such equip- [fol. 177] ment, and that there was a rental market for petitioner's revenue equipment. We are satisfied also that there was a rental market for petitioner's office equipment.

Petitioner's revenue equipment included four kinds:

1. Tractor-trailer combinations and trucks used in "line-haul" or inter-city traffic, hauling general commodities or "dry freight."

2. Tractor-trailer combinations used in the transportation of petroleum products.

3. Pick-up and delivery trucks used at terminal points for gathering and distributing shipments of freight.

4. A passenger bus used regularly on a specified route. We are unable to determine from the evidence any material difference in rental value of the two types of equipment listed as 1 and 2 above, so they are considered together.

We find that on August 11, 1944, petitioner had 14 tractor-trailer combinations, 4 trucks used in line-haul or inter-city service, 8 pick-up and delivery trucks, and 1 passenger bus. These figures do not include any equipment acquired after August 11, 1944. Also omitted from consideration is one truck (which the evidence indicates was used for pick-up and delivery) which was the property of R. B. Distributing Company, for the use of which truck demand for payment was made on the Federal Manager by R. B. Distributing Company. One tractor-trailer combination was claimed as the property of Western Brokerage [fol. 178] Company, but was carried on petitioner's books as petitioner's property; and Western Brokerage Company consented to petitioner's use of this equipment. Therefore, it was petitioner which lost the use of this tractor and trailer; so this equipment is included in the property being considered here.

1. Line Haul Equipment

(a) Rate per mile

There is a wide range of variation in testimony as to fair rental value of line haul revenue equipment. Petitioner has undertaken to show it is entitled to a rental which might have been obtained by lease of the vehicles to persons engaged in the business of private or contract carrier. Witnesses testified to gross rental rates including all expenses (which would be paid by the lessor) as high as 70 cents per mile and as low as 22 cents per mile. One witness, however,

a Mr. Frazier, who was engaged in the truck leasing business gave testimony with direct reference to the particular equipment belonging to petitioner. It was his opinion that a fair rental of this equipment would be a gross rate of 25 cents per running mile, and that such equipment could have been rented and operated at that rate for at least 5,000 miles per month per vehicle. In order to arrive at a net rental rate, petitioner in its computations has deducted from this 25 cents a mile figure an amount for costs per mile of 12.17 cents. This latter figure was derived from the following process: A study of 21 representative common carriers indicated a figure for cost per mile in line haul operations of 16.18 cents, including depreciation, and 15.19 cents not including depreciation. By calculation of a wit- [fol. 179] ness for petitioner, Mr. Mears, the information developed by the study just mentioned was applied to petitioner's 1944 operations and a cost per mile was computed at 12.98 cents, including depreciation and 12.17 cents excluding depreciation. On these computations petitioner suggests a net rate per mile of the difference between the 25 cent gross rate and the 12.17 cent cost figure, or 12.83 cents.

With reference to the calculations just described, the respondent makes a point that petitioner was not a "representative carrier," that its operating ratio was higher than average; and, therefore, that it is unreasonable to conclude that its costs could be lower than average. The respondent makes a further point that in these computations no part of general overhead was attributed to line haul operations. There appears to be some logic in these objections but we are unable to determine to what extent either or both of these facts would alter the 12.17 cent figure for costs per mile. We reject this method of computation for the reason that the gross rental figure of 25 cents has specific reference to the leasing of petitioner's equipment for use by private or contract carriers, while the cost figure has its basis on information and calculations having to do with common carrier operations, both in the twenty-one carrier study referred to and in the particular application to petitioner's common carrier operation.

On the other hand the respondent contends that a reasonable rental rate per mile was 2.207 cents. This figure is computed on the basis of giving petitioner a 10 per cent

annual return over and above normal depreciation. This [fol. 180] method was introduced by a witness for respondent, Mr. Ferris, a man with long experience and recognized qualifications as an accountant, but without experience in the operation of carriers, common or private; and Mr. Ferris' testimony was only that such a rate would produce the return mentioned, and not that such a rate would be a fair market rental.

Another of respondent's witnesses, Mr. Girard, testified that a reasonable rental would be 15 per cent of gross revenue or what is commonly referred to in the common carrier business as an operating ratio of 85. Examination of Mr. Girard's testimony convinces us that his testimony was based on the premise that the equipment could be used only in the same business which had been conducted by petitioner. We cannot limit our considerations to that type of operation. Also, this method makes the compensation dependent upon the use to which the Government put the property and, thus, involves the consideration of what the Government gained instead of what the petitioner lost. We hold to the view that the measure of compensation would not be changed if the Government had kept the equipment idle during the period of its possession.

The only evidence introduced in this case as to a fair net rental value per mile of line haul equipment, stated as a net figure without the many calculations involving costs or gross revenues, is that of the respondent's witness, Mr. Longenecker, who was the Federal Manager in charge of the operation of petitioner's transportation system, as well as those of the 102 other carriers named in Executive Order 9462. Mr. Longenecker had long experience in the [fol. 181] transportation business, both before and after his service with the Government. He has had experience in renting revenue equipment. He even had some experience in the renting of equipment when acting as Federal Manager, at the very time and in the very locality involved in this controversy. When interrogated about the rental value in August 1944 and subsequent months up to November 1945, of trucks and combinations of tractor and single axle trailers, Mr. Longenecker expressed his opinion that a fair net rental to the owner would be 6 cents to 8 cents per mile. We find that this opinion of a fair net rental rate per

mile is the one most reliably supported by the evidence in this case. There is testimony that the rental value of straight trucks which were adapted to line haul use would be about the same as that of the combinations which petitioner had. As applied to the particular equipment owned by petitioner, it is our finding that a fair net rental rate per mile for all of the complete line haul vehicles was 7 cents. We find that a fair net rental for the one extra tractor owned by petitioner was 5 cents per mile.

(b) Mileage

What is the mileage to which the rate thus determined shall be applied?

Petitioner has introduced in evidence an exhibit indicating the total line haul mileage, month by month traveled by its vehicles during the calendar year 1944, as 1,164,516 miles. This information was compiled from records of the petitioner for the period prior to Government seizure and from figures kept by petitioner's General Manager, [fol. 182] Buergi, for the period between August 11, 1944 and January 1, 1945, during which time he acted as Operating Manager under appointment by the Federal Manager.

In computing rental which it says might be proper for the 10 months from January 1 to November 1, 1945, during which it is admitted that the Government took and used petitioner's property, the respondent has used as a basis for computation the total mileage for 1944, as shown by petitioner's exhibit above mentioned, taking ten twelfths of that mileage figure. However, it must be remembered that in respondent's computation the mileage used as a basis was mileage accumulated during a period immediately preceding the date on which the respondent admits taking petitioner's property, and under the respondent's theory all this mileage would have been run during operation by the petitioner of its own system. This is not true under our view of the case. The taking was on August 11, 1944. If any such method of computation were to be used, it would seem better to consider elements which a willing lessor and a willing lessee would have been aware of on that date, and the principal element as to mileage would have been past experience. Such experience would not include mileage

traveled after August 11, 1944, when the Government was operating petitioner's system.

However, the computation of mileage by projection from any "base period" of petitioners own operation includes a consideration of elements other than the number and type of vehicles. Mileage accumulated during any such base period must have been in some measure dependent on the [fol. 183] amount of business which the petitioner had, and the amount of business in turn must have been partly attributable to administrative activity, promotion and the use of all the petitioner's office, shop and other facilities. These elements would not be present if petitioner ceased operating its carrier business and began leasing its vehicles.

We have before us direct testimony to the effect that the particular vehicles could have been rented for an average of 5,000 miles per month per vehicle, for the period of Government control. We believe it proper to base our computation on this testimony. This would mean that the petitioner had lost the opportunity to rent its tractor-trailer combinations and trucks used in line haul service (18 in number on August 11, 1944) a total of 1,320,000 miles, at the rate of 7 cents per mile as heretofore determined. In addition to these vehicles, petitioner had one extra tractor which could have rented for a total of 73,333 miles, at a rate of 5 cents per mile.

We do not undertake to draw a line of distinction between mileage for common carrier use and mileage for private carrier use. The evidence is entirely unsatisfactory as to just how much difference there might be between the two and even as to which might be greater. We simply find that the above figures represent the best evidence before us on mileage for which petitioner's equipment could have been rented. Nor is the rate per mile labeled either common or contract. There is some testimony that rental for contract carrier purposes might be higher, but this testimony is too vague to be the basis of any determination of a difference. In a situation of critical shortage and great demand, the [fol. 184] use to which a prospective lessee intended to put the equipment would have little to do with the rental at which he might be able to obtain it.

Thus we find that a fair net market rental value for pe-

titioner's line haul vehicles for the period of Government control and operation is as follows:

For 18 trucks and combinations (1,320,000 mile @ 7¢ per mile)	$92,400 00
For 1 extra tractor (73,333 miles @ 5¢ per mile)	3,666 65
Total	$96,066 65

2. Pick-up and Delivery Trucks

There is little conflict in the testimony with reference to rental rates for pick-up and delivery equipment. While the respondent did introduce evidence to the effect that a rate of $1.13 per day would produce a 10 per cent return to the owner, again there was no evidence that this 10 per cent constituted a fair rental.

Testimony offered by the petitioner showed that the usual and accepted rate of rental for pick-up and delivery trucks on August 11, 1944, was $2.50 per hour, and that the cost of operation which would be borne by the owner amounted to $1.388 per hour, making a net rental of $1.11 per hour. Petitioner's evidence further showed that such vehicles could have been rented for 10 hours a day, six days a week. Computation on the basis of these figures produces a total net rental for petitioner's eight pick-up and delivery trucks, for the entire period of Government operation of $33,566.40.

[fol. 185] 3. Passenger Bus

On August 11, 1944, petitioner owned one passenger bus, a 1927 model Yellow Coach, which was in regular daily operation on petitioner's bus route. We find from the evidence that this bus continued such operation until November 2, 1944, when it was replaced by another bus purchased after Government seizure of the system. We find, therefore, that the bus owned by petitioner at the time of seizure was used and was usable on the regular route only through November 2, 1949, or a period of 83 days.

The only evidence before us as to a rental rate for such a bus indicates a rate of $22.00 per day. This rate ok for days produces a total rental for the bus of $1,826.00.

4. Office Equipment

The only evidence on this subject before the Commission indicates that office equipment of petitioner, which was taken by the Government, could have been rented at a

then prevalent market rate of 10 per cent of its value per month. This office equipment has beeen found to have been worth, on August 11, 1944, $5,272.70. Computation at the rate of 10 per cent per month for the period of Government control produces a figure of $7,704.94.

We therefore conclude that petitioner is entitled to just compensation in the form of rental for its properties taken and used by the respondent in the following amounts:

[fol. 186]

Line Haul Vehicles	$ 96,066.65
Pick-up & Delivery Trucks	33,566.40
Passenger Bus	1,826.00
Office Equipment	7,704.94
	$139,163.99

B. Additional Compensation

Petitioner has shown that, based on its own appraisals and balance sheets, the net value of all of its assets diminished between August 11, 1944 and November 4, 1945 in the amount of $65,017.97, this in spite of whatever the Government may have contributed during its operation to the extinguishment of liabilities or purchase of new equipment. Petitioner has conceded that it is not entitled to recover such portion of this diminution as is attributable solely to depreciation or solely to any fluctuation in general market conditions.

On the other hand, the Government concedes that in the case of a taking for temporary use, the owner of property may be entitled to special damages, when proved in addition to rental.

We think the petitioner has approached this subject from the wrong end, in merely deducting from a gross diminution amounts attributable to those things which it admits are ordinarily the risks of the owner in the usual lease agreement. Our view is that in addition to rental, petitioner is entitled to compensation for any special loss or damage, amounting to a permanent taking of any portion of its property. However, the burden is on the petitioner to prove such loss or damage and to prove further that it [fol. 187] was caused by some act of the Government in either the taking or the use. Yazel v. United States, 93 F. Supp. 1000. Such act might be either misuse, abuse or

waste, or might consist of neglect of some duty imposed upon the Government by the nature of the relationship.

From a comparison of balance sheets for August 11, 1944 and November 1, 1945, it appears that current assets were $13,739.86 less on November 1, 1945 than on August 11, 1944. The items included under current assets are: cash on deposit, working funds, special deposits, notes receivable, accounts receivable, subscription to capital stock and materials and supplies inventory. These were usable or expendable items and the diminution in their value is due to their having been used up to the extent of their loss in value. We treat in the same category an item shown as "deferred debits," representing prepaid insurance premiums and license fees. The diminution in this item was $1,299.05.

We therefore find that of the assets mentioned in the preceding paragraph, a total amount of $15,038.91 was consumed or completely used up by the Government in its operation. We treat this as a total and permanent taking of assets of that value.

On the date of the seizure, petitioner had a contract with the Socony Vacuum Oil Company for the transportation of petroleum products. On March 25, 1945, the Federal Manager canceled and terminated that contract, so that the petitioner had no further rights thereunder. The value of that contract was $2,500.00. We therefore find that by the Federal Manager's action, the respondent completely [fol. 188] and permanently took and destroyed the petitioner's property, consisting of his rights under the contract, in the amount of $2,500.00.

Petitioner claims considerable damage was done to its revenue equipment. Under its theory, petitioner contends that it is entitled to recover the entire amount of such damage, with the exception of that portion which is attributable to change in market conditions and depreciation. With this we do not agree. However, when petitioner's revenue equipment was returned to it on November 1, 1945, a complete inventory and inspection of each item disclosed that repairs and replacement of parts had to be made to the extent of $13,246.04, to place them in servicable condition. These repairs were made by petitioner.

We recognize that ordinary wear and tear are the risk of the owner in a lease arrangement. However, the rental

to which we have found that petitioner is entitled is a net rental, out of which petitioner would not be obliged to pay any of the operating expenses whatever. The cost of usual repairs and replacement of parts necessary to keep equipment in a usable and servicable condition is one of the expenses of operation and is not an expense which is included in ordinary depreciation. We therefore conclude that the physical damage to petitioner's revenue equipment which had been sustained on November 1, 1945, and which it was necessary to repair to place the equipment in usable condition is not to be considered a part of ordinary wear and tear. This damage was due to the Government's neglect and failure to make needed repairs during the term of its possession. We therefore find that petitioner is [fol. 189] entitled to additional compensation on this account in the amount of $13,246.04.

C. Credits to Government

During the period of Government operation, the Government paid off certain previously existing obligations in the total amount of $31,536.03.

Also, during the same period the Government purchased new revenue equipment which was turned over to petitioner on November 1, 1945. This equipment was valued on that date by petitioner at $15,251.54.

The Government also purchased, during the period of its control, other new equipment which was turned over to petitioner on November 1, 1945. That equipment was purchased at a price of $1,372.19, and accrued depreciation being deducted, was valued by the Government on November 1, 1945 at $1,301.03.

While the respondent has not filed any plea of set-off or counterclaim as such, the Act creating this Commission provides that "a final determination of the Commission shall include * * * (b) whether there are any allowable offsets, counterclaims, or other deductions and, if so, the amount thereof." We therefore report that the petitioner has received, in the manner just outlined, assets paid for by the Government in the total amount of $48,088.60, and that such amount should be credited against the total compensation to which petitioner is otherwise entitled.

[fol. 190] D. Interest

An additional sum is computed in the manner of interest, not to be paid as interest, but as a part of the total compensation which would repay petitioner for its loss in the property taken. This additional sum is to make the total allowed compensate petitioner as fully as though payment had not been deferred. Phelps v. United States, 274 U.S. 341.

The taking on August 11, 1944 was of the use of petitioner's property and the value of said use is computed as rental. The amount of such rental did not become fixed until there could be a determination of the length of the period of use. The compensation due for such use was not only undetermined but incapable of determination until the end of the period. Rental, if paid on November 1, 1945, would be presumed to have compensated petitioner for the use of all of its property until that date. During the period of Government possession, petitioner had no use of any of its property and was not deprived of any greater interest in any of it by consumption or destruction until the time came for its return. Therefore, the additional sum computed in the manner of interest will be calculated from November 1, 1945 on the total net compensation hereinbefore determined.

Since the sole object is to compensate petitioner, the rate adopted is 4 per cent per annum, which is consistent with prevailing rates of interest during recent years. Arkansas Valley Railroad v. United States, 107 Ct. Cl. 240.

[fol. 191] Order

Let this determination be filed with the Clerk of the Commission as provided by law. The Clerk is directed to give notice of the filing hereof to the parties by serving copy on attorneys of record, either personally or by mail.

EXHIBIT 13-M. TO STIPULATION OF FACTS

April 18, 1952.

Hon. Holmes Baldridge,
Assistant Attorney General of the United States,
Department of Justice,
Washington, D. C.

Re: Claims of Midwest Motor Carriers—Motor Carriers Claims Commission

DEAR SIR:

In behalf of 91 of the 94 claimants represented by the undersigned before the Motor Carrier Claims Commission, we desire at this time to submit for your consideration a new proposal for disposition of said 91 claims on a stipulated basis. Subject to approval by the Department of Justice we propose that the foregoing claims be submited to the Commission upon stipulation for entry of judgment upon the following basis:

1. The rental rates established for tractors-trailers, straight trucks, other vehicles, real estate and office equipment in the Chief Freight Lines Case and subsequent cases determined by the Commission prior to date here- [fol. 192] of, will be reduced in each rental category by ⅓ for the purpose of determining rental compensation in each of the 91 cases.

2. Rental compensation for tractors and trailers held under lease during the period of Federal possession and control will be compensated at the rental rate determined by the Commission in the Lee Way Motor Freight Inc. case which was 4½¢ for tractor-trailer combinations 3¢ being for the tractors and 1½¢ for tractor-trailer combinations 3¢ being for the tractors and 1½¢ for the trailer, such rates to be reduced by ⅓ in the same manner as provided above.

3. Upon application of the foregoing rates to the properties of the individual carriers there shall be deducted from the resulting sum any profit realized in any given case during the period of Federal Possession and control (August 12, 1944 to date of release in each case) and any advance of Federal funds during said period with respect to any particular carriers. If the properties of any of said

91 carriers were operated at a loss during the period of Federal possession and control the amount of such loss shall be added to the compensation determined as above.

4. In the five cases in which the Government has recognized the existence of substantial special damages we propose allowance of damages for said carriers in the following amounts:

[fol. 193]

Arthur F. Janke d/b/a Janke Transfer Company	$ 50,000.00
Midnite Express, Inc.	190,000.00
Wilson Storage & Transfer Co.	185,000.00
Steve Bonello d/b/a Century Motor Freight Matthews Freight Service, Inc.	175,000.00

One figure is given for Century Motor Freight and Matthews Freight Service, Inc. by reason of the fact that the Federal Manager consolidated these two operations and their affairs and claims are inseparable.

5. It is further proposed that upon application of the foregoing proposal to the claims of the 91 carriers that the aggregate recovery for said group shall in no event exceed the sum of $8,800,000.00.

6. With respect to the claims of M.K.&C. Truck Lines and Pacific Intermountain Express the undersigned as one of the attorneys for M.K.&C. agrees to use his best efforts to obtain a dismissal of the Pacific Intermountain Express Claim. These claims are presently consolidated on the docket of the Commission for determination and in *any* event only one claim will be asserted.

7. The three carriers represented by the undersigned but which are not included in this proposal are Triangle Terminal Co., Hi-Way Freight Terminal, Inc. and R-B Freight Lines, Inc.

It is understood that interest at the rate of 4% per annum will be added to the recovery of the several carriers, computed from the date of release in each case to date of payment.

[fol. 194] Should the foregoing proposal be acceptable to the Department of Justice it is understood that the details of the application of the formula will have the full cooperation of the parties in the end of saving time and unnecessary delay.

Respectfully submitted, R. B. May

RGM:mlp

Exhibit 14-N—Final Determination (Omissions) Reasons for Findings and Conclusions;

Omitted from the printed record pursuant to designation of counsel as to printing record, copied at Page 1.

IN THE TAX COURT OF THE UNITED STATES

T. C. Memo. 1958-22

Docket No. 58364

GILLETTE MOTOR TRANSPORT, INC., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

MEMORANDUM OPINION

Joseph A. Maun, Esq., for the petitioner.
Robert L. Liken, Esq., for the respondent.

Tråin, Judge: Respondent determined deficiencies in peti- [fol. 195] tioner's income taxes for the taxable years ended December 31, 1952, and December 31, 1953, as follows:

Year	Deficiency
1952	$57,111.13
1953	18,097.38

The deficiency for the taxable year 1953 depends upon a determination of a deficiency for 1952. The issues to be decided relate to the treatment to be accorded an award by the Motor Carrier Claims Commission. They are:

1. Whether the sum of $157,843.99 received by the petitioner in 1952 as the result of an award by the Motor Carrier Claims Commission is taxable to petitioner in 1952 or was accruable prior thereto?

2. If taxable in 1952, is said sum taxable as captial gain under the provisions of section 117(j) of the Internal Revenue Code of 1939, or as ordinary income under section 22 (a) of the Internal Revenue Code of 1929?

All of the facts are stipulated and as stipulated are adopted as the findings of fact.

Petitioner is, and was at all times material to this proceeding, a corporation organized under the laws of Texas, with its principal place of business at Dallas, Texas. Petitioner filed its income tax returns for the calendar years 1952 and 1953 on the accrual basis with the district director of internal revenue for Dallas, Texas.

[fol. 196] The facts as stipulated are substantially identical with those of Midwest Motor Express, Inc., 27 T.C. 167 (1956), affd. —— F.2d —— (C.A. 8, 1958), and the issues of this case are the same as the first two issues presented in Midwest Motor Express, Inc., supra. The parties have agreed to this.

We have considered the issues and find no reason for changing our opinion expressed in Midwest Motor Express, Inc. as to those identical issues. Therefore, we adopt the opinion of Midwest Motor Express, Inc., supra, as to the identical issues presented herein, as the opinion in this case.

The sum of $157,843.99 received by petitioner in 1952 as the result of an award by the Motor Carrier Claims Commission is taxable to petitioner in 1952 as ordinary income under section 22(a) of the 1939 Internal Revenue Code.

Decision will be entered for the respondent.

[fol. 197] IN THE TAX COURT OF THE UNITED STATES

Docket No. 58364

GILLETTE MOTOR TRANSPORT, INC., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION—February 3, 1958

Pursuant to the determination of the Court, as set forth in its Memorandum Opinion, filed February 12, 1858, it is

Ordered and Decided: That there are deficiencies in income tax of $57,111.13 and $18,097.38 for the taxable years 1952 and 1953, respectively.

Enter:

Entered Feb. 3, 1958.

/s/ Russell E. Train, Judge.

IN THE TAX COURT OF THE UNITED STATES

JOINT MOTION TO CORRECT THE OPINION AND VACATE THE DECISION—Filed Mar. 4, 1958.

The Parties Move that the opinion of the Court promulgated February 12, 1958, be corrected, and that the decision entered February 13, 1958 be vacated.

In support thereof, the parties show that paragraphs 33 to 35, inclusive, of the Stipulation of Facts which are in-
[fol. 198] corporated by reference in the Opinion, constitute concessions on the part of the Respondent which will therefore necessitate a Rule 50 Decision in this case.

Wherefore, it is Prayed, that this motion be granted.

/s/ Joseph A. Maun, William R. Busch, Attorneys for Petitioner, 425 Hamm Building, St. Paul, Minnesota. Arch M. Cantrall, ATA, Chief Counsel, Internal Revenue Service, Attorney for Respondent.

IN THE TAX COURT OF THE UNITED STATES

ORDER MODIFYING MEMORANDUM OPINION AND VACATING DECISION—March 6, 1958

The parties herein having filed on March 4, 1958, a "Joint Motion to Correct the Opinion and Vacate the Decision" in connection with our report filed February 12, 1958, T.C. Memo. 1958-22, and our decision entered February 13, 1958, and after due consideration having been given thereto, it is

Ordered: That said motion be and is hereby granted, and that the words "Decision will be entered for the respon- [fol. 199] dent" appearing at the end of the Memorandum Opinion, be eliminated therefrom and that there be substituted therefor the words "Decision will be entered under Rule 50." It is further

Ordered: That the Court's decision entered February 13, 1958, be and the same is hereby vacated and set aside.

/s/ Russell E. Train, Judge. (Seal)

Dated: Washington, D.C., March 6, 1958.

IN THE TAX COURT OF THE UNITED STATES

Docket No. 58364

Washington

GILLETTE MOTOR TRANSPORT, INC., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION—April 17, 1958

Pursuant to the Court's Memorandum Opinion filed February 12, 1958, and an Order dated March 6, 1958, amending the foregoing Memorandum Opinion, the res-

pondent and petitioner herein having filed an agreed computation on April 14, 1958, now therefore, it is

[fol. 200] Ordered and Decided: That there are deficiencies in income tax for the taxable years 1952 and 1953 in the amounts of $57,111.13 and $6,485.24, respectively.

Enter:

Entered Apr. 17, 1958.

/s/ Russell E. Train, Judge.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Docket No. 58364

GILLETTE MOTOR TRANSPORT, INC., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION FOR REVIEW—Filed May 9, 1958.

To: The Honorable Judges of the United States Court of Appeals for the Fifth Circuit:

Gillette Motor Transport Inc., the petitioner in this cause, by the undersigned counsel, hereby files its petition for a review by the United States Court of Appeals for the Fifth Circuit of the decision by the Tax Court of the United States entered on April 17, 1958, determining deficiencies in the petitioner's federal income taxes for the calendar years 1952 and 1953 in the respective amounts of $57,111.13 and $6,485.24 and respectfully shows:

[fol. 201] I

This Petition for Review is filed pursuant to the provisions of Section 7482 and 7483 of the Internal Revenue Code of 1954.

II

The petitioner, Gillette Motor Transport, Inc., is a corporation duly organized and existing under and by virtue

of the Laws of the State of Texas, and during the years involved maintained its principal place of business at Dallas, Texas. Petitioner's income tax return for 1952 and for 1953, the taxable years involved, were timely filed with the District Director of Internal Revenue for the Second District of Texas.

III

Nature of the Controversy

At all times material herein, petitioner was a common carrier of property by motor vehicle, engaged in interstate commerce, and reported its income on the accrual basis of accounting. In 1952, petitioner received $157,843.99 in payment of an award entered in its favor by the Motor Carrier Claims Commission for the taking of petitioner's property by the United States in 1944.

The Tax Court determined that the award payment so received by petitioner in 1952 was taxable to petitioner in that year as ordinary income under Section 22(a) of the 1939 Internal Revenue Code. As a result of this determination, the net operating loss of $36,634.37 reported by petitioner [fol. 202] for 1952 was eliminated as was the net operating loss carry-over deduction in that amount claimed by petitioner in 1953 to be eliminated as well. This resulted in the deficiency asserted against petitioner for the year 1953.

The petitioner contends that the determinations of the Tax Court are erroneous in fact and contrary to law.

IV

Assignment of Errors

1. The Tax Court erroneously determined that the sum of $157,843.99 received by petitioner in 1952 in payment of an award entered in its favor by the Motor Carrier Claims Commission was taxable to petitioner in 1952 as ordinary income under Section 22(a) of the 1939 Internal Revenue Code.

2. The Tax Court erroneously failed to determine that the sum of $157,843.99 received by the petitioner in 1952 as a result of an award by the Motor Carrier Claims Commission was accruable to petitioner in a year prior to 1952, or finding that said sum was taxable in 1952, the Tax Court erroneously failed to determine that the said sum was tax-

able as capital gain under the provisions of Section 117(j) of the Internal Revenue Code of 1939.

Wherefore, the petitioner prays that:

1. This Court review the decision of the Tax Court of the United States of April 17, 1958 in this proceeding:
[fol. 203] 2. The decision of the Tax Court be reversed;
3. The petitioner be granted such other and further relief as the Court may deem just and proper.

Respectfully submitted, /s/ Joseph A. Maun, 425 Hamm Building, St. Paul 2, Minnesota. William E. Collins, Republic National Bank Building, Dallas 1, Texas.

Of Counsel: Bundlie, Kelley & Maun, 425 Hamm Building, St. Paul 2, Minnesota. Thompson, Knight Wright & Simmons, Republic National Bank Building, Dallas 1, Texas.

STATE OF MINNESOTA,
County of Ramsey. ss:

Joseph A. Maun, being first duly sworn, says that he is counsel of record in the above named cause; that as such counsel he is authorized to verify the foregoing Petition for Review; that he has read the said Petition and is familiar with the statements contained therein; that the statements made are true to the best of his knowledge, information and belief.

Joseph A. Maun.

[fol. 204] Subscribed as sworn to before me, this 28 day of April, 1958.

Dorothy A. Peske, Notary Public, Dakota County, Minn. (Seal).

My Commission expires Dec. 10, 1963.

STATE OF TEXAS,
County of Dallas. ss:

William E. Collins, being first duly sworn, says that he is counsel of record in the above named cause, that as such counsel he is authorized to verify the foregoing Petition

for Review; that he has read the said Petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief.

William E. Collins.

Subscribed and sworn to before me, this 6th day of May 1958.

Estela Gonzalez, Notary Public.

[fol. 205] IN THE UNITED STATES COURT OF APPEALS

NOTICE BY PETITIONER OF FILING PETITION FOR REVIEW—Filed May 9, 1958.

To: Chief Counsel, International Revenue Service, Washington, D. C.:

You are hereby notified that the Petitioner did on the 6th day of May, 1958, mail to the Clerk of The Tax Court of the United States at Washington, D. C., for filing in said Court a petition for review by the United States Court of Appeals for the Fifth Circuit, of the decision of said Tax Court heretofore rendered in the above entitled case. Copy of the petition for review as filed is hereto attached and served upon you.

Dated April 28, 1958.

s/ Joseph A. Maun, 425 Hamm Building, St. Paul 2, Minnesota. William E. Collins, Republic National Bank Building, Dallas 1, Texas.

Of Counsel: Bundlie, Kelley & Maun, 425 Hamm Building, St. Paul 2, Minnesota.

[fol. 206] Service of a copy of the petition for review (filed May 9, 1958), acknowledged this 9th day of May, 1958.

Thompson, Knight, Wright & Simmons, Republic National Bank Building, Dallas 1, Texas. s/ Arch M. Cantrall, Car, Chief Counsel, Internal Revenue Service, Attorney for Respondent.

Order for Transmission of Original Exhibit, dated 5/22/58;

Omitted from the printed record pursuant to designation of counsel as to printing record, copied at Page 1.

* * * * * * *

IN THE TAX COURT OF THE UNITED STATES

DESIGNATION OF CONTENTS OF RECORD ON REVIEW—
Filed May 8, 1958

To: The Clerk of the Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Court of Appeals for the Fifth Circuit copies duly certified as correct of the following documents and records in the above-entitled cause in con-
[fol. 207] nection with the Petition for Review heretofore by the petitioner:

1. Docket entries of proceedings before the Tax Court.
2. Pleadings before the Tax Court, as follows:

(a) Petition.
(b) Answer.
(c) Amended Petition.
(d) Answer to Amended Petition.

3. Stipulation of Facts by the parties hereto with Exhibits 1-A; 2-B; 4-D; 5-E; 6-F; 7-G; 8-H; 9-I; 10-; 11-K; 12-L; 13-M; and 14-N attached hereto, received in evidence, identified as Stipulation of Facts.
4. Opinion of the Tax Court.
5. Decision of the Tax Court dated February 13, 1958.
6. Joint Motion to Correct the Opinion and Vacate the Decision.
7. Order of the Tax Court.
8. Decision of the Tax Court dated April 17, 1958.
9. Petition for Review.
[fol. 208] 10. This Designation of Contents of Record on Review.

Joseph A. Mann, 425 Mann Bldg., St. Paul 2, Minnesota. William E. Collins, Republic National Bank Bldg., Dallas 1, Texas.

Of Counsel: Bundlie, Kelley and Maun, Attorneys for Petitioner, 425 Hamm Building, St. Paul 2, Minnesota. Thompson, Knight, Wright & Simmons, Republic National Bank Building, Dallas 1, Texas.

Service is hereby acknowledged and Designation is approved as being adequate for record on review, this 9th day of May, 1958.

/Signed/ Arch M. Cantrall, Car, Chief Counsel, Internal Revenue Service, Counsel for Respondent.

[fol. 209] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 210] IN THE UNITED STATES COURT OF APPEALS

ARGUMENT AND SUBMISSION—November 24, 1958

(Omitted in printing)

[fol. 211] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17280

GILLETTE MOTOR TRANSPORT, INC., Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE, Respondent

Petition for Review of Decision of the Tax Court of the United States (District of Texas)

OPINION—April 1, 1959

Before Hutcheson, Chief Judge, and Cameron and Brown, Circuit Judges

Brown, Circuit Judge: This case presents the same question dealt with by the 8th Circuit in *Midwest Motor Express v. Commissioner*, 27 T.C. 167, 8 Cir., 1958, 251 F.2d 405,

cert. denied, —— U.S. ——, —— S.Ct. ——, 3 L.Ed. 2d 105. The problem is whether the amount received as a Fifth Amendment award of just compensation was from involun- [fol. 212] tary conversion of property under Section 117(j) of the Internal Revenue Code of 1939. The facts, stipulated there and here, are substantially the same, but with great deference to that distinguished Court, we reach the opposite conclusion.

The case, as is so often the situation with tax matters, is hardly one of contemporary history. What is at stake here is compensation to Gillette for commandeering its motor truck business in 1944-1945. After the lines were turned back by the Government in 1945, the owners sought to negotiate Fifth Amendment just compensation. The efforts were unavailing. One operator sought and obtained a Court of Claims judgment *Wheelock Bros., Inc. v. United States*, Ct.Cl., 1950, 88 F.Supp. 278, vacated for jurisdictional reasons, 1951, 341 U.S. 319, 71 S.Ct. 730, 95 L.Ed. 966. Because the Government took the position that each of the more than 100 cases would have to be separately litigated through the Court of Claims, the trucking interests sought the intervention of Congress. Congress passed the Motor Carriers Claims Commission Act. Act of July 2, 1948, Chapter 808, 62 Stat. 1222. It was agreed substantially that the R-B Freight Lines claim would be tried by both sides as a test case to "establish the pattern for disposition of the cases to follow." The Claims Commission decided the R-B Freight Lines case and pursuant to the Act the Government sought certiorari direct from the Supreme Court. This was denied, *United States v. R-B Freight Lines*, 1952, 342 U.S. 933, 72 S.Ct. 376, 96 L.Ed. 695. The agreed stipulation here reflects categorically that this test case "understanding * * * was not followed. The [fol. 213] Department of Justice refused to go along with the R-B Freight Lines decision as a basis for settlement or disposition of the other claims because it desired to present to the Motor Carrier Claims Commission new and additional evidence bearing upon matters which it had considered unimportant; and because it desired to reiterate and further express the arguments previously advanced." The Carriers then proceeded to submit to the Claims Commission nine cases including Gillette's. The stipulation

further shows that with ten down and about eighty-four more claims to go, it "* * * appeared that there would be substantial delays in the processing of all of the remaining cases * * * as long as the Government reserved its right to process each case separately and use up the full six months' period under which it had the technical right to file further petitions for certiorari." Faced with this situation "the carriers, including [Gillette] were in need of money and as a result, in 1952, authorized" their representative to make an agreement "under which the measure of compensation determined under the R.B. Freight Lines principles would be reduced." Such agreement was made reducing the so-called rental value by approximately one-third.

The order and opinion of the Motor Carriers Claims Commission in Gillette's case which is part of the stipulated facts reflects that in that proceeding "the Government [contended] that such 'interference' as petitioner may have encountered from Government action did not amount to a taking of its property but merely to regulation." At another point it was stated "The respondent [Government] contends that, if anything was taken, the [fol. 214] taking was of something far short of possession, occupancy, use, enjoyment, and managerial discretion."

These contentions were categorically rejected by the Claims Commission in its order and opinion of March 31, 1952. "* * * [T]he petitioner's transportation system and all its property used or useful in the operation of such system were taken for public use by * * * the United States, and were thereafter possessed, controlled and used by [Government] until * * * June 16, 1945." Concerning the argument that the "interference" was mere regulation, the Commission said, "To place any such construction on the acts done by the Federal Manager would be to belie the statements contained in the Executive Order * * * Possession and control having been once taken, all things done by the Federal Manager were done by him as the representative of the United States charged with maintaining for the United States its possession and control." Again it was stated, "In our opinion, however, the Executive Order and the Notice and Order of Possession and control leave no room for doubt as to what the Govern-

ment took. Both documents call for the taking of possession and assumption of control of petitioner's motor carrier transportation system 'including all real and personal property and other assets, wherever situated, used or useful in connection with the operation of such system.' • • • We are concerned with what petitioner was deprived of. We find that petitioner was deprived of its property and of the right to determine what use should be made of it. • • •."

[fol. 215] Now seven years later, the Government is again contending that there was no taking of property. In the context of this income tax case, the Government contends that what Gillette received as Fifth Amendment just compensation was not for the taking of its property, but merely for its *use*.

We agree with the 8th Circuit that the problem may not be disposed of as one of res judicata, 251 F.2d 405, 411. But we do not so readily put to one side, as that Court seems to do, the findings of the Claims Commission. What was taken and how it was taken was the subject of that inquiry and decision. The payments received which are here the subject of the income tax claim as income or as capital gains came into being from that Award. As the Motor Carriers Claims Commission it did not, of course, have statutory authority to determine tax matters or consequences. But as to a claim submitted to it, it had exclusive jurisdiction to determine whether there was a taking, what was taken, and what "just compensation" was required. See *United States v. Wheelock Bros., Inc.*, 1951, 341 U.S. 319, 71 S.Ct. 730, 95 L.Ed. 966.

Despite the disavowal in its brief that "We [do not] have any quarrel with taxpayer's argument that the facts show a 'taking' of 'property' within the meaning of the fifth Amendment," the effect of the Government's argument is to once again challenge the basic nature of this seizure of a truck line and its property. It is substantially the same contention in a different garb. The contention briefly is that as *title* was not taken over and the truck equipment [fol. 216] was commandeered only temporarily and thereafter returned ten months later, it is obvious that the Government did not *take* any property, and all it got was the *use* of it. Continuing to the next step, the Government

says that since the *use* of property is not a depreciable item, the involuntary governmental seizure does not qualify under Section 117(j) because there was no conversion of any "property used in the trade or business."[1]

So far as we are able to grasp the metaphysical dialectic which the Government's brief advances, it is the contention [fol. 217] that conversion[2] of property under Section

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[1] Section 117(j)(1) defines "property used in the trade or business."

"(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term 'property used in the trade or business' means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." 26 USCA, Int. Rev. Code of 1939, §1717(j); as added by Rev. Act of 1942, §151(b), 56 Stat. 798.

[2] Section 117(j), note 1, supra, provides:

"(2) *General rule.*—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. * * *"

117(j) arises only when full *title* is acquired or taken.[3]

When we bear in mind that "the tax law deals in economic realities, not legal abstractions." *Commissioner v. Southwest Exploration Co.*, 1956, 350 U.S. 308 at 315, —— S.Ct. ——, 100 L.Ed. 347, 354, we think there can be no basis for these gossamer distinctions. They ignore the nature of the actual taking here as found authoritatively by the Claims Commission. They ignore the nature of seizure or condemnation by the Government. And they ignore the language of Section 117(j) which expressly expands relief beyond "sales or exchanges."

We are here concerned with the "Compulsory or involuntary conversion * * * as a result of * * * seizure, or an exercise of the power of requisition or condemnation * * *." §117(j)(2). The idea of a peremptory commandeering of property by a sovereign is expressed in terms of a seizure, a requisition or a condemnation. As the sover- [fol. 218] eign was here the United States, it is positively

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[3] The Government's brief states: "But the fact that the Government's *use or control* was with respect to depreciable items used in taxpayer's trade or business does not establish that there was a conversion of those depreciable items.

"Taxpayer's concession (and indeed argument) that there was a taking of its 'property rights' is also the basic fallacy of its argument * * *. True, it may possibly be said, broadly, that an involuntary relinquishment of use for a temporary period is an involuntary conversion to the extent of an award for *use* during that period, as here, but * * * Section 117(j) applies only to involuntary conversions of * * * depreciable property. The question is whether there was an 'involuntary conversion' of taxpayer's *depreciable* property. The control of such property was of course taken over by the Government but only for a limited and temporary period. It was for the *use* of such property for that limited period that taxpayer received compensation by way of an award * * *. Accordingly, there was no 'involuntary conversion' of taxpayer's *depreciable* property * * *." (emphasis in original).

established that the constitutional obligation of just compensation has little, if anything, to do with *title*. "Broadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: It can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings. Under the first method—physical seizure— no condemnation proceedings are instituted, and the property owner is provided a remedy under the Tucker Act * * * to recover just compensation." *United States* v. *Dow*, 1958, 357 U.S. 17, 21, 78 S.Ct. 1039, 2 L.Ed. 2d 1109, 1114. Taking possession of the property is the "event which gives rise to the claim for compensation * * *." 357 U.S. 17 at 22. Title commensurate with the right appropriated undoubtedly passes at some stage, e.g., payment, but this is wholly incidental and in no way conditions the Government's power to acquire the property or its use or the significance of its taking.[4] The term "property" as used in the Fifth Amendment has "been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. * * * In other words, it deals with what lawyers term the individual's 'interest' in the thing in question. * * * The constitutional provision [fol. 219] is addressed to every sort of interest the citizen may possess. * * *." *United States* v. *General Motors Corporation*, 1945, 323 U.S. 373, 378, 65 S.Ct. 357, 89 L.Ed. 311.

So long as that property was "used in the trade or business." i.e., subject to depreciation, there is nothing to indicate here that Congress, in dealing with governmental seizures, intended to use the term property in Section 117 (j) in any narrower sense. If, as the Government argues,

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[4] See Acquisition of Property for Wartime Purposes, published by the Lands Division of the Department of Justice 42-43 (1944); and Appendix I and II of Justice Frankfurter's concurring opinion, Youngstown Sheet & Tube Co. v. Sawyer, 1952, 343, U.S. 579, 593, 615, 72 S.Ct. 863, 96 L.Ed. 1153, listing 84 seizures of industrial plants and facilities from 1861 through 1952, including the subject of this litigation "Midwest Trucking Operators."

there must be acquistion of complete title to make a "conversion" then the express inclusion of these involuntary proceedings (seizure, requisition, condemnation) in Section 117(j) was wholly superfluous. This is so because ample relief would have been available by treating the transaction as a sale or exchange (i.e., exchanging the title and property for cash or the Government's obligation, either recognized or judicially enforced, to pay just compensation).

The question of title likewise has nothing to do with the economic realities of the taking of possession even though it is for an indeterminate period. There is still a change, i.e., conversion, from absolute ownership of a thing having a certain useful life into something else. The something else is (a) the constitutional obligation of the sovereign to pay for the value and (b) the remnant or salvage remaining if and when the chattel is returned. This is not a mere hypothetical possibility. In this case the principal subjects of the just compensation award were the truck-tractors, cargo trailers and pickup trucks. Each vehicle had both an accounting an actual useful economic life. At [fol. 220] the time of this seizure no one knew for what length of time the Government's exclusive possession would continue. It depended on fortuitous events[5] including the arbitrary decisions of labor leaders and world dictators. Possession was essential for ten months. It might just as well have continued for another thirty months.

What the Government took then was something more than the "use" of these vehicles. It got forever and irretrievably ten months of the useful life of each vehicle. This could never be replaced. If, for example, the useful economic life of a specific vehicle was three years, and the Government's possession had continued for that time, what the Government "took" on the day of seizure was a truck, what it returned would have been a piece of junk. That certainly is a conversion. If it is, it is still a con-

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[5] Possession of Gillette's property terminated June 16, 1945. Germany had just signed the unconditional surrender on May 6, 1945. The "bomb" was obviously being readied for use and was soon to fall on Hiroshima August 6, 1945 and to be followed by the surrender aboard U.S.S. Missouri September 2, 1945.

version if subsequent events reduce the period of possession from the entire useful economic life of the chattel to the substantial one of ten months. In either case the Government takes a vehicle with an ascertainable economic life. It returns somthing less. It has used, it has utilized, it has consumed, it has converted the difference.

The same would be true of taking over, whether by seizure or condemnation, of the remainder of a leasehold interest. Whatever its common law technical implications, [fol. 221] the lessee's rights are those of possession and enjoyment. When the Government takes this, it must pay. *United States* v. *General Motors Corporation*, 1945, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311, 156 A.L.R. 390. If the entire remainder of the leasehold term is commandeered, the lessee, as owner of that present interest, has lost it altogether. In its place stands the Government's payment or constitutional obligation to pay. The citizen had an interest in a leasehold. Now he has lost that. He has lost it from involuntary seizure, requisition or condemnation. What he has left is a claim. If this is not conversion[6] of one thing into another, then the word has little meaning.

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[6] Under the regulations, it is not necessary to convert the property *into* something else, e.g., cash.

Treasury Regulation 118, Section 39.117(j)-1(2) provides,

"(2) For the purpose of this section, the 'involuntary conversion' of property is the conversion of such property into money or other property as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof. Losses upon the destruction in whole or in part, theft or seizure, requisition or condemnation of property are treated as losses upon an involuntary conversion *whether or not there was a conversion of the property into money or other property.* For example, if a capital asset held for more than six months, with an adjusted basis of $400, is stolen, and the loss from this theft is not compensated for by insurance or otherwise, the $400 loss is included in the computations under section 117(j)." (emphasis supplied)

This approach likewise reflects a symmetry with principles of just compensation under governmental acquisitions. The Government argues strenuously that what was awarded was *rent*. To be sure it was computed on the basis of established rental values for such motor truck equipment. But the objective was not to award profits [fol. 222] which would have been received, or income which would have been received, either net or gross, from operations or by rental. The objective was to determine the value of the thing taken—the appropriation for an indeterminate time of the exclusive right of possession, direction and control. That value is its probable rental value, but the award is for the value, not the rent. "The value compensable under the Fifth Amendment, therefore, is only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent. Its measure is the amount of that equivalent * * *. But when the property is of a kind seldom exchanged, it has no 'market price,' and then recourse must be had to other means of ascertaining value, including even value to the owner as indicative of the value to other potential owners enjoying the same rights. * * * These considerations have special relevance where 'property' is 'taken' not in fee but for an indeterminate period. * * * We agree with both lower courts, therefore, that the proper measure of compensation is the rental that probably could have been obtained and so this Court has held in the two recent cases dealing with temporary takings. *United States* v. *General Motors Corporation*, 323 U.S. 373; *United States* v. *Petty Motor Company*, 327 U.S. 372." *Kimball Laundry Co.* v. *United States*, 1949, 338 U.S. 1, 5-7, 69 S.Ct. 1434, 93 L.Ed. 1765.

That would most certainly be pertinent here for the facts are uncontradicted that Gillette was happy as a transport company. It wanted to remain in that business. So much so did it desire to continue, that it and others had the courage collectively to challenge demands of labor organiza- [fol. 223] tions which were deemed inequitable. It refused to budge. The Government took over. This is relevant because Gillette was not in the business of *renting* its equipment. It was an operator and wanted to continue to be one. The Government could not compel it to be a

renter—i.e., a lessor. It could, of course, by its sovereign power, take, either permanently or indeterminately. But the taking was not a lease, and its obligation was not to pay rent, but to pay just compensation for the value of that right.

Finally, the stipulated facts and the stipulated Opinion and Order of the Claims Commission likewise demonstrate an absolute taking of property through executive seizure. The seizure was peremptory, mandatory and involuntary.

On the commencement of the strike by the drivers on August 4, the operations of the Midwest Motor Truck Carriers was interrupted. Except for a brief time between August 4 and 11, Gillette was permitted "with the consent of the union" to transport Government freight and war materials. On August 11, 1944, all operations were shut down by the union's strike. On that day, the President issued Executive Order [7] 9462. It ordered the Director of the Office of Defense Transportation "to take possession and assume control of, and to operate, or arrange for [fol. 224] the operation of, the motor carrier transportation systems of the motor carriers named * * *, including all real and personal property and other assets, wherever situated, used or useful in connection with operation of such systems."

The exclusive dominion, control and direction covered all of Gillette's property, including specifically 55 tractor-trailer combinations, 14 spare tractors, 23 pickup delivery trucks, and 5 passenger service vehicles. In ascertaining just compensation on the vicarious rental value on the industry accepted mileage basis, the Commission found that the tractors and trailer vehicles would have been leased on a minimum of 5,000 miles per month. That means

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[7] The Order recited for its authority:

"Now Therefore, by virtue of the power and authority vested in me by the Constitution and laws of the United States, including the Act of August 29, 1916, 39 Stat. 645, the First War Powers Act, 1941, and Section 9 of the Selective Training and Service Act of 1940 as amended by the War Labor Disputes Act as President of the United States and Commander in Chief of the Army and Navy, it is hereby ordered as follows: * * *."

that for the roughly ten months of the seizure these 69 over-the-road vehicles traveled, or would be expected to travel, over 3,450,000 miles. In that operation the Government got something more than *use*, i.e., carrying capacity of the vehicles. Unlike "the wonderful one-hoss shay * * * that * * * ran a hundred years to a day" and "went to pieces all at once—all at once, and nothing first, just as bubbles * * * when they burst," each mile operated used up a part of the economic life of the vehicle. The part thus "consumed" could not be returned. It was lost and gone forever.

There was a seizure. It was involutary. The Government took over and used property. The property was clearly property used in the trade and business of the Taxpayer. The just compensation[8] received for the taking [fol. 225] qualified under Section 117(j). The cause must therefore be reversed and remanded to the Tax Court for further and other consistent proceedings.

Reversed and Re anded.

HUTCHESON, Chief Judge, Dissenting:

While I do not agree with all that is said in the Eighth Circuit opinion in the Midwest Motor Express case, 251 F(2) 405, affirming the oipnion of the Tax Court, 27 T.C. 167, I do agree fully with the result reached therein. I disagree, therefore, with the views expressed in, and the result of, the opinion of the majority in this case, and respectfully dissent therefrom.

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[8] The agreed award, after the settlement, was $157,843.99. This comprised a vicarious net rental allowance of $122,926.21 and interest as a part of the award at 4% from June 16, 1945, to July 23, 1952, in the amount of $34,917.78. Whether the interest amount of $34,917.78 requires a different treatment is not before us and has not been determined. See, e.g., Kieselbach v. Commissioner, 1942, 317 U.S. 399, ... S.Ct. . . . ., 87 L.Ed. 358; 320 East 47th Street Corp. v. Commissioner, 2 Cir., 1957, 243 F.2d 894; 3B Mertens, Law of Federal Income Taxation, §22.93, n. 76.

[fol. 226] IN UNITED STATES COURT OF APPEALS

No. 17280

GILLETTE MOTOR TRANSPORT, INC.

versus

COMMISSIONER OF INTERNAL REVENUE

JUDGMENT—April 1, 1959

This cause came on to be heard on the petition of Gillette Motor Transport, Inc., for review of a decision of the Tax Court of the United States, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decision of the Tax Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the Tax Court for further and other consistent proceedings in accordance with the opinion of this Court.

"Hutcheson, Chief Judge, Dissenting."

[fol. 227] CLERK'S CERTIFICATE TO FOREGOING TRANSCRIPT OMITTED IN PRINTING

[fol. 228] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1958

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—June 24, 1959

Upon consideration of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 29th, 1959.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 24th day of June, 1959.

[fol. 229] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1959

No. 359

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

vs.

GILLETTE MOTOR TRANSPORT, INC.

ORDER ALLOWING CERTIORARI—November 9, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Supreme Court, U.S.
FILED
AUG 28 1959
JAMES R. BROWNING, Clerk

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In the United States

October Term, 1959

No. [illegible]

[illegible]

Petitioner,

vs.

[illegible]

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE [illegible] CIRCUIT

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. ——

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

GILLETTE MOTOR TRANSPORT, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 194–196) is not officially reported. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 9–22) is reported at 265 F. 2d 648.

JURISDICTION

The judgment of the Court of Appeals was entered on May 8, 1959. (Appendix A, *infra*, p. 22.) On June 24, 1959, by order of Mr. Justice Black, the time for filing a petition for a writ of certiorari was extended to August 29, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the amount of $157,843.99, received by the taxpayer in 1952 as the result of an award by the Motor Carrier Claims Commission, is taxable as ordinary income under Section 22(a) of the Internal Revenue Code of 1939, as the Commissioner contends, or whether it is taxable, as the court below held, as capital gain from an involuntary conversion of property used in a trade or business under Section 117(j) of the 1939 Code.

STATUTE INVOLVED

Sections 22(a) and 117(j) of the Internal Revenue Code of 1939 are set forth in Appendix B, *infra*, pp. 23–24.

STATEMENT

The stipulated facts (R. 86–194), as adopted by the Tax Court (R. 195) and related in part by the Court of Appeals (Appendix A, *infra*, pp. 9–12, 20–21), may be summarized as follows:

At all pertinent times the taxpayer, a Texas corporation, was engaged in business as a common carrier of property by motor vehicle. Prior to August 11, 1944, the taxpayer owned and operated motor tractors, trucks, semi-trailers, pick-up trucks, and service cars. From November 15, 1939, to August 11, 1944, the taxpayer and other motor carriers in the Midwest were operating under substantially similar contracts with a drivers' union. In 1943, a group of Midwestern carriers, including the taxpayer, sought to negotiate a separate contract with the union. Negotiations deadlocked and the matter was certified to the War Labor Board which decided that wage rates

should be increased. Because of an alleged inability to pay the increases, the taxpayer continued to operate under the old contract until August 4, 1944, when the drivers went out on strike (R. 86–90).

On August 11, 1944, President Roosevelt issued an order permitting the Director of the Office of Defense Transportation to take possession of and operate certain listed motor carrier transportation systems, including taxpayer's, as long as necessary for the successful prosecution of the war. On the same date, the Director of the Office of Defense Transportation sent the taxpayer a "Notice and Order Establishing Federal Possession and Control and Appointing a Federal Manager" (R. 90–97).

A federal manager of the motor transport systems and properties was appointed, and he issued an order directing the motor transport companies to resume normal operations by the means customarily employed, subject to the terms of Executive Order No. 9462, 3 C.F.R., 1943–1948, p. 322 (R. 97–103). The order further recited that title to the properties and other assets would remain in the owners, and that (R. 98):

> Possession by the United States is not exclusive, and the United States asserts, and will assert, only such control over the properties in its limited possession as may be necessary to accomplish the purposes of operation and of said Executive Order.

Subject to their right to file written protests and objections to the federal manager's order, the carriers agreed to resume operations (R. 104–106).

Possession and control of the taxpayer's motor transport system was maintained through the federal manager from August 12, 1944, to June 16, 1945. During this period, the taxpayer received orders and notices fixing wages, prescribing accounting methods, and in general regulating its operations (R. 107–108).

When control was restored to the carriers in 1945, the owners sought to negotiate for the payment of Fifth Amendment just compensation for the taking. Because each of the more than 100 cases would have required separate litigation in the Court of Claims, the trucking interests sought the intervention of Congress. Accordingly, the Act of July 2, 1948, c. 808, 62 Stat. 1222, established a Motor Carrier Claims Commission to hear and determine claims arising out of the Government's taking of possession and control, subject to review by this Court on writ of certiorari. (Appendix A, *infra*, p. 10; R. 125–129.)

The award of the Claims Commission in the taxpayer's case was handed down on May 18, 1952, and stated that the Government was indebted to the taxpayer in the amount of $195,361.92 "as rental for the use of petitioner's properties". Against this amount, the Commission allowed the Government a credit of $7,315.08 for profits realized during the period of control, but also required as part of just compensation the payment of a sum equal to four percent interest on the net amount of $188,046.84 from the date of the return of the property (June 16, 1945) until the date of payment. However, under a computation agreed upon by the parties to settle the many remaining

claims, this amount was reduced to $122,926.21 plus an interest equivalent of $34,917.78, or a total of $157,843.99. (Appendix A, *infra*, p. 21, fn. 8; R. 109–117.)

The taxpayer received the $157,843.99 during 1952, disclosed this fact on its tax returns, but did not include any portion of the award as taxable income (R. 117). The Commissioner of Internal Revenue determined deficiencies in income tax for the years 1952 and 1953 based on his view that the entire award was ordinary income in the year 1952 (R. 12–17). On the taxpayer's petition, the Tax Court followed its opinion in *Midwest Motor Express* v. *Commissioner*, 27 T.C. 167, affirmed, 251 F. 2d 405 (C.A. 8th), certiorari denied, 358 U.S. 875, a case involving (R. 196) "substantially identical" facts. The Tax Court held that the taxpayer was required to report the transaction in 1952, and that the award could not be treated as capital gain under Section 117(j) of the Internal Revenue Code of 1939 because it was not received as the result of an involuntary conversion of an asset used in the taxpayer's trade or business. The award was held to be ordinary income under Section 22(a) of the 1939 Code, and the deficiencies were sustained (R. 194–196).

The Court of Appeals, Chief Judge Hutcheson dissenting, reversed on the ground that the taxpayer's rights to property had been converted by governmental action into a claim for just compensation, and that "The just compensation received for the taking qualified under Section 117(j)." (Appendix A, *infra*, pp. 9–22.)

REASONS FOR GRANTING THE WRIT

1. The decision in this case presents a square conflict between two Courts of Appeals on the question as to whether Motor Carrier Claims Commission awards resulting from the Government's taking control of certain trucking companies during World War II are to be treated, for income tax purposes, as ordinary rental income under Section 22(a) of the 1939 Code, Appendix B, *infra*, p. 23, or as capital gain from an involuntary conversion of depreciable business assets under section 117(j), Appendix B, *infra*, pp. 23–24.

In *Midwest Motor Express* v. *Commissioner*, 251 F. 2d 405, certiorari denied, 358 U.S. 875, the Eighth Circuit held that the payments were for the use of property and were therefore ordinary income, *i.e.*, rent (p. 412):

> Practical considerations prohibit calling this use or rental payment an involuntary conversion of capital assets. * * * To allow that use payment to be denominated capital gain in order to arrive at a lesser tax rate would, in our opinion, be completely contrary to Congressional intent in enacting § 117(j). * * *

In the present case, a precisely contrary interpretation of the law was applied. The Fifth Circuit here states that (Appendix A, *infra*, pp. 9, 21–22):

> The facts, stipulated there [*Midwest Motor*] and here, are substantially the same, but with great deference to that distinguished Court, we reach the opposite conclusion.
>
> * * * * *
>
> There was a seizure. It was involuntary. The Government took over and used prop-

erty. The property was clearly property used in the trade and business of the Taxpayer. The just compensation received for the taking qualified under Section 117(j).

2. The question presented is of substantial importance, involving an interpretation of the provisions of the federal tax laws in a factual situation present in a number of undecided cases. The records of the Internal Revenue Service indicate that the issue is presented in 36 docketed cases with deficiencies totaling $1,882,971.[1] There are also undocketed cases involving the same issue.[2]

We believe that it is necessary for this Court to establish a uniform rule to be applied in these cases, and submit that the Eighth Circuit and the Tax Court, in holding that the seizure did not constitute an involuntary conversion of business assets (motor vehicles) within the meaning of the tax laws, but was

[1] These figures are subject to some possible change. Section 99 of the Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606, provides that awards of the Motor Carrier Claims Commission "shall, at the election of the taxpayer, under regulations prescribed by the Secretary of the Treasury or his delegate, be deemed to be income which was received or accrued in the taxable years during which such motor carrier transportation system was in the possession or control of the United States." This election must be made by September 2, 1959. It is not possible to tell at this time if this provision will affect the over-all amount of taxes involved. The figures given here are as of August 1, 1959.

[2] Due to the fact that the question presented involves claims resulting from the Government's control over certain trucking companies during World War II, the total number of cases is necessarily limited. However, the principles involved may also be important for future takings of this type, if there should be any.

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merely a taking for temporary use for which the Government was required to pay just compensation in the nature of rent, correctly decided the issue. The express language of the statute, contemporary legislative construction of Section 117(j),[3] subsequent expressions of congressional interpretation,[4] and principles established by prior decisions of this Court,[5] all confirm the Eighth Circuit's and the Tax Court's analysis that such awards are ordinary income rather than capital gain.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
A. F. PRESCOTT,
JAMES P. TURNER,
Attorneys.

AUGUST 1959.

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[3] H. Rep. No. 2333, 77th Cong., 2d Sess., p. 97 (1942–2 Cum. Bull. 372, 445); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 50, 119–120 (1942–2 Cum. Bull. 504, 545, 594).

[4] S. Rep. No. 1983, 85th Cong., 2d Sess., pp. 114–115 (1958–3 Cum. Bull. 922, 1035–1036).

[5] Compare *Kimball Laundry Co.* v. *United States*, 338 U.S. 1; *Hort* v. *Commissioner*, 313 U.S. 28.

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 17280

GILLETTE MOTOR TRANSPORT, INC., PETITIONER

versus

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Petition for Review of Decision of the Tax Court of the United States (District of Texas).

(April 1, 1959.)

Before HUTCHESON, Chief Judge, and CAMERON and BROWN, Circuit Judges

BROWN, *Circuit Judge:* This case presents the same question dealt with by the 8th Circuit in *Midwest Motor Express* v. *Commissioner,* 27 T.C. 167, 8 Cir., 1958, 251 F. 2d 405, cert. denied, —U.S. —, — S. Ct. —, 3 L. Ed. 2d 105. The problem is whether the amount received as a Fifth Amendment award of just compensation was from involuntary conversion of property under Section 117(j) of the Internal Revenue Code of 1939. The facts, stipulated there and here, are substantially the same, but with great deference to that distinguished Court, we reach the opposite conclusion.

The case as is so often the situation with tax matters, is hardly one of contemporary history. What is at

stake here is compensation to Gillette for commandeering its motor truck business in 1944–1945. After the lines were turned back by the Government in 1945, the owners sought to negotiate Fifth Amendment just compensation. The efforts were unavailing. One operator sought and obtained a Court of Claims judgment. *Wheelock Bros., Inc.* v. *United States,* Ct. Cl., 1950, 88 F. Supp. 278, vacated for jurisdictional reasons, 1951, 341 U.S. 319, 71 S. Ct. 730, 95 L. Ed. 966. Because the Government took the position that each of the more than 100 cases would have to be separately litigated through the Court of Claims, the trucking interests sought the intervention of Congress. Congress passed the Motor Carriers Claims Commission Act. Act of July 2, 1948, Chapter 808, 62 Stat. 1222. It was agreed substantially that the R-B Freight Lines claim would be tried by both sides as a test case to "establish the pattern for disposition of the cases to follow." The Claims Commission decided the R-B Freight Lines case and pursuant to the Act the Government sought certiorari direct from the Supreme Court. This was denied, *United States* v. *R-B Freight Lines,* 1952, 342 U.S. 933, 72 S. Ct. 376, 96 L. Ed. 695. The agreed stipulation here reflects categorically that this test case "understanding * * * was not followed. The Department of Justice refused to go along with the R-B Freight Lines decision as a basis for settlement or disposition of the other claims because it desired to present to the Motor Carrier Claims Commission new and additional evidence bearing upon matters which it had considered unimportant; and because it desired to reiterate and further express the arguments previously advanced." The Carriers then proceeded to submit to the Claims Commission nine cases including Gillette's. The stipulation further shows that with ten down and about

eighty-four more claims to go, it "* * * appeared that there would be substantial delays in the processing of all of the remaining cases * * * as long as the Government reserved its right to process each case separately and use up the full six months' period under which it had the technical right to file further petitions for certiorari." Faced with this situation "the carriers, including [Gillette], were in need of money and as a result, in 1952, authorized" their representative to make an agreement "under which the measure of compensation determined under the R-B Freight Lines principles would be reduced." Such agreement was made reducing the so-called rental value by approximately one-third.

The order and opinion of the Motor Carriers Claims Commission in Gillette's case which is part of the stipulated facts reflects that in that proceeding "the Government [contended] that such 'interference' as petitioner may have encountered from Government action did not amount to a taking of its property but merely to regulation." At another point it was stated "The respondent [Government] contends that, if anything was taken, the taking was of something far short of possession, occupancy, use, enjoyment, and managerial discretion."

These contentions were categorically rejected by the Claims Commission in its order and opinion of March 31, 1952. "* * * [T]he petitioner's transportation system and all its property used or useful in the operation of such system were taken for public use by * * * the United States, and were thereafter possessed, controlled and used by [Government] until * * * June 16, 1945." Concerning the argument that the "interference" was mere regulation, the Commission said, "To place any such construction on the acts done by the Federal Manager would be

to belie the statements contained in the Executive Order * * * Possession and control having been once taken, all things done by the Federal Manager were done by him as the representative of the United States charged with maintaining for the United States its possession and control." Again it was stated, "In our opinion, however, the Executive Order and the Notice and Order of Possession and control leave no room for doubt as to what the Government took. Both documents call for the taking of possession and assumption of control of petitioner's motor carrier transportation system 'including all real and personal property and other assets, wherever situated, used or useful in connection with the operation of such system.' * * * We are concerned with what petitioner was deprived of. We find that petitioner was deprived of its property and of the right to determine what use should be made of it. * * *."

Now, seven years later, the Government is again contending that there was no taking of property. In the context of this income tax case, the Government contends that what Gillette received as Fifth Amendment just compensation was not for the taking of its property, but merely for its *use*.

We agree with the 8th Circuit that the problem may not be disposed of as one of res judicata, 251 F. 2d 405, 411. But we do not so readily put to one side, as that Court seems to do, the findings of the Claims Commission. What was taken and how it was taken was the subject of that inquiry and decision. The payments received which are here the subject of the income tax claim as income or as capital gains came into being from that Award. As the Motor Carriers Claims Commission it did not, of course, have statutory authority to determine tax matters or consequences. But as to a claim submitted to it,

it had exclusive jurisdiction to determine whether there was a taking, what was taken, and what "just compensation" was required. See *United States* v. *Wheelock Bros. Inc.*, 1951, 341 U.S. 319, 71 S. Ct. 730, 95 L. Ed. 966.

Despite the disavowal in its brief that "We [do not] have any quarrel with taxpayer's argument that the facts show a 'taking' of 'property' within the meaning of the Fifth Amendment," the effect of the Government's argument is to once again challenge the basic nature of this seizure of a truck line and its property. It is substantially the same contention in a different garb. The contention briefly is that as *title* was not taken over and the truck equipment was commandeered only temporarily and thereafter returned ten months later, it is obvious that the Government did not *take* any property, and all it got was the *use* of it. Continuing to the next step, the Government says that since the *use* of property is not a depreciable item, the involuntary governmental seizure does not qualify under Section 117(j) because there was no conversion of any "property used in the trade or business."[1]

[1] Section 117(j)(1) defines "property used in the trade or business."

"(1) *Definition of property used in the trade or business.*— For the purposes of this subsection, the term 'property used in the trade or business' means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." 26 USCA, Int. Rev. Code of 1939, § 117(j), as added by Rev. Act of 1942, § 151(b), 56 Stat. 798.

So far as we are able to grasp the metaphysical dialectic which the Government's brief advances, it is the contention that conversion[2] of property under Section 117(j) arises only when full *title* is acquired or taken.[3]

When we bear in mind that "the tax law deals in economic realities, not legal abstractions," *Commis-*

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[2] Section 117(j), note 1, supra, provides:

"(2) *General rule.*—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. * * *."

[3] The Government's brief states: "But the fact that the Government's *use or control* was with respect to depreciable items used in taxpayer's trade or business does not establish that there was a conversion of those depreciable items.

"Taxpayer's concession (and indeed argument) that there was a taking of its 'property rights' is also the basic fallacy of its argument * * *. True, it may possibly be said, broadly, that an involuntary relinquishment of use for a temporary period is an involuntary conversion to the extent of an award for *use* during that period, as here, but * * * Section 117(j) applies only to involuntary conversions of * * * depreciable property. The question is whether there was an 'involuntary conversion' of taxpayer's *depreciable* property. The control of such property was of course taken over by the Government but only for a limited and temporary period. It was for the *use* of such property for that limited period that taxpayer received compensation by way of an award * * *. Accordingly, there was no 'involuntary conversion' of taxpayer's *depreciable* property * * *." [Emphasis in original.]

sioner v. *Southwest Exploration Co.*, 1956, 350 U.S. 308 at 315, —S. Ct.—, 100 L. Ed. 347, 354, we think there can be no basis for these gossamer distinctions. They ignore the nature of the actual taking here as found authoritatively by the Claims Commission. They ignore the nature of seizure or condemnation by the Government. And they ignore the language of Section 117(j) which expressly expands relief beyond "sales or exchanges."

We are here concerned with the "compulsory or involuntary conversion * * * as a result of * * * seizure, or an exercise of the power of requisition or condemnation * * *." § 117(j)(2). The idea, of a peremptory commandeering of property by a sovereign is expressed in terms of a seizure, a requisition or a condemnation. As the sovereign was here the United States, it is positively established that the constitutional obligation of just compensation has little, if anything, to do with *title*. Broadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: It can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings. Under the first method—physical seizure—no condemnation proceedings are instituted, and the property owner is provided a remedy under the Tucker Act * * * to recover just compensation," *United States* v. *Dow*, 1958, 357 U.S. 17, 21, 78 S. Ct. 1039, 2 L. Ed. 2d 1109, 1114. Taking possession of the property is the "event which gives rise to the claim for compensation * * *." 357 U.S. 17 at 22. Title commensurate with the right appropriated undoubtedly passes at some stage, e.g., payment, but this is wholly incidental and in no way conditions the Government's power to acquire the

property or its use or the significance of its taking.* The term "property" as used in the Fifth Amendment has "been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. * * * In other words, it deals with what lawyers term the individual's 'interest' in the thing in question. * * * The constitutional provision is addressed to every sort of interest the citizen may possess. * * *." *United States* v. *General Motors Corporation*, 1945, 323 U.S. 373, 378, 65 S. Ct. 357, 89 L. Ed. 311.

So long as that property was "used in the trade or business," i.e., subject to depreciation, there is nothing to indicate here that Congress, in dealing with governmental seizures, intended to use the term property in Section 117(j) in any narrower sense. If, as the Government argues, there must be acquisition of complete title to make a "conversion" then the express inclusion of these involuntary proceedings (seizure, requisition, condemnation) in Section 117(j) was wholly superfluous. This is so because ample relief would have been available by treating the transaction as a sale or exchange (i.e., exchanging the title and property for cash or the Government's obligation, either recognized or judicially enforced, to pay just compensation).

The question of title likewise has nothing to do with the economic realities of the taking of possession even

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*See Acquisition of Property for Wartime Purposes, published by the Lands Division of the Department of Justice 42–43 (1944); and Appendix I and II of Justice Frankfurter's concurring opinion, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 1952, 343 U.S. 579, 593, 615, 72 S. Ct. 863, 96 L. Ed. 1153, listing 84 seizures of industrial plants and facilities from 1861 through 1952, including the subject of this litigation "Midwest Trucking Operators."

though it is for an indeterminate period. There is still a change, i.e., conversion, from absolute ownership of a thing having a certain useful life into something else. The something else is (a) the constitutional obligation of the sovereign to pay for the value and (b) the remnant or salvage remaining if and when the chattel is returned. This is not a mere hypothetical possibility. In this case, the principal subjects of the just compensation award were the truck-tractors, cargo trailers and pickup trucks. Each vehicle had both an accounting and an actual useful economic life. At the time of this seizure no one knew for what length of time the Government's exclusive possession would continue. It depended on fortuitous events [5] including the arbitrary decisions of labor leaders and world dictators. Possession was essential for ten months. It might just as well have continued for another thirty months.

What the Government took then was something more than the "use" of these vehicles. It got forever and irretrievably ten months of the useful life of each vehicle. This could never be replaced. If, for example, the useful economic life of a specific vehicle was three years, and the Government's possession had continued for that time, what the Government "took" on the day of seizure was a truck, what it returned would have been a piece of junk. That certainly is a conversion. If it is, it is still a conversion if subsequent events reduce the period of possession from the entire useful economic life of the chattel to the substantial one of ten months. In either case the Govern-

[5] Possession of Gillette's property terminated June 16, 1945. Germany had just signed the unconditional surrender on May 6, 1945. The "bomb" was obviously being readied for use and was soon to fall on Hiroshima August 6, 1945 and to be followed by the surrender aboard U.S.S. *Missouri* (September 2, 1945.

ment takes a vehicle with an ascertainable economic life. It returns something less. It has used, it has utilized, it has consumed, it has converted the difference.

The same would be true of a taking over, whether by seizure or condemnation, of the remainder of a leasehold interest. Whatever its common law technical implications, the lessee's rights are those of possession and enjoyment. When the Government takes this, it must pay. *United States* v. *General Motors Corporation,* 1945, 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311, 156 A.L.R. 390. If the entire remainder of the leasehold term is commandeered, the lessee, as owner of that present interest, has lost it altogether. In its place stands the Government's payment or constitutional obligation to pay. The citizen had an interest in a leasehold. Now he has lost that. He has lost it from involuntary seizure, requisition or condemnation. What he has left is a claim. If this is not conversion[6] of one thing into another, then the word has little meaning.

---

[6] Under the regulations, it is not necessary to convert the property *into* something else, e.g., cash. . . .

Treasury Regulation 118, Section 39.117(j)-1(2) provides, "(2) For the purpose of this section, the 'involuntary conversion' of property is the conversion of such property into money or other property as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof. Losses upon the destruction in whole or in part, theft or seizure, requisition or condemnation of property are treated as losses upon an involuntary conversion *whether or not there was a conversion of the property into money or other property.* For example, if a capital asset held for more than six months, with an adjusted basis of $400, is stolen, and the loss from this theft is not compensated for by insurance or otherwise, the $400 loss is included in the computations under section 117(j)." [Emphasis supplied.]

This approach likewise reflects a symmetry with principles of just compensation under governmental acquisitions. The Government argues strenuously that what was awarded was *rent.* To be sure it was computed on the basis of established rental values for such motor truck equipment. But the objective was not to award profits which would have been received, or income which would have been received, either net or gross, from operations or by rental. The objective was to determine the value of the thing taken—the appropriation for an indeterminate time of the exclusive right of possession, direction and control. That value is its probable rental value, but the award is for the value, not the rent. "The value compensable under the Fifth Amendment, therefore, is only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent. Its measure is the amount of that equivalent * * *. But when the property is of a kind seldom exchanged, it has no 'market price,' and then recourse must be had to other means of ascertaining value, including even value to the owner as indicative of the value to other potential owners enjoying the same rights. * * * These considerations have special relevance where 'property' is 'taken' not in fee but for an indeterminate period. * * * We agree with both lower courts, therefore, that the proper measure of compensation is the rental that probably could have been obtained, and so this Court has held in the two recent cases dealing with temporary takings. *United States* v. *General Motors Corporation,* 323 U.S. 373; *United States* v. *Petty Motor Company,* 327 U.S. 372." *Kimball Laundry Co.* v. *United States,* 1949, 338 U.S. 1, 5-7, 69 S. Ct. 1434, 93 L. Ed. 1765.

That would most certainly be pertinent here for the facts are uncontradicted that Gillette was happy as a

transport company. It wanted to remain in that business. So much so did it desire to continue, that it and others had the courage collectively to challenge demands of labor organizations which were deemed inequitable. It refused to budge. The Government took over. This is relevant because Gillette was not in the business of *renting* its equipment. It was an operator and wanted to continue to be one. The Government could not compel it to be a renter—i.e., a lessor. It could, of course, by its sovereign power, take, either permanently or indeterminately. But the taking was not a lease, and its obligation was not to pay rent, but to pay just compensation for the value of that right.

Finally, the stipulated facts and the stipulated Opinion and Order of the Claims Commission likewise demonstrate an absolute taking of property through executive seizure. The seizure was peremptory, mandatory and involuntary.

On the commencement of the strike by the drivers on August 4, the operations of the Midwest Motor Truck Carriers was interrupted. Except for a brief time between August 4 and 11, Gillette was permitted "with the consent of the union" to transport Government freight and war materials. On August 11, 1944, all operations were shut down by the union's strike. On that day, the President issued Executive Order[7] 9462. It ordered the Director of the Office of Defense

[7] The Order recited for its authority:

"Now Therefore, by virtue of the power and authority vested in me by the Constitution and laws of the United States, including the Act of August 29, 1916, 39 Stat. 645, the First War Powers Act, 1941, and Section 9 of the Selective Training and Service Act of 1940 as amended by the War Labor Disputes Act, as President of the United States and Commander in Chief of the Army and Navy, it is hereby ordered as follows: * * *."

Transportation "to take possession and assume control of, and to operate, or arrange for the operation of, the motor carrier transportation systems of the motor carriers named * * *, including all real and personal property and other assets, wherever situated, used or useful in connection with operation of such systems."

The exclusive dominion, control and direction covered all of Gillette's property, including specifically 55 tractor-trailer combinations, 14 spare tractors, 23 pickup delivery trucks, and 5 passenger service vehicles. In ascertaining just compensation on the vicarious rental value on the industry accepted mileage basis, the Commission found that the tractors and trailer vehicles would have been leased on a minimum of 5,000 miles per month. That means that for the roughly ten months of the seizure these 69 over-the-road vehicles traveled, or would be expected to travel, over 3,450,000 miles. In that operation the Government got something more than *use*, i.e., carrying capacity of the vehicles. Unlike "the wonderful one-hoss shay * * * that * * * ran a hundred years to a day" and "went to pieces all at once—all at once, and nothing first, just as bubbles * * * when they burst," each mile operated used up a part of the economic life of the vehicle. The part thus "consumed" could not be returned. It was lost and gone forever.

There was a seizure. It was involuntary. The Government took over and used property. The property was clearly property used in the trade and business of the Taxpayer. The just compensation[8] re-

[8] The agreed award, after the settlement, was $157,843.99. This comprised a vicarious net rental allowance of $122,926.21 and interest as a part of the award at 4% from June 16, 1945, to July 23, 1952, in the amount of $34,917.78. Whether the interest amount of $34,917.78 requires a different treatment is not before us and has not been determined. See, e.g., *Kieselbach* v. *Commissioner*, 1942, 317 U.S. 399, —S. Ct.—, 87 L. Ed.

ceived for the taking qualified under Section 117(j). The cause must therefore be reversed and remanded to the Tax Court for further and other consistent proceedings.

Reversed and remanded.

HUTCHESON, *Chief Judge,* Dissenting:

While I do not agree with all that is said in the Eighth Circuit opinion in the Midwest Motor Express case, 251 F(2) 405, affirming the opinion of the Tax Court. 27 T.C. 167. I do agree fully with the result reached therein. I disagree, therefore, with the views expressed in, and the result of, the opinion of the majority in this case, and respectfully dissent therefrom.

[Caption omitted]

Judgment

This cause came on to be heard on the petition of Gillette Motor Transport, Inc., for review of a decision of the Tax Court of the United States, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decision of the Tax Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the Tax Court for further and other consistent proceedings in accordance with the opinion of this Court.

"HUTCHESON, *Chief Judge,* Dissenting."

APRIL 1, 1959.

358; *320 East 47th Street Corp.* v. *Commissioner*, 2 Cir., 1957, 243 F. 2d 894; 3B Mertens, Law of Federal Income Taxation, § 22.93, n. 76.

APPENDIX B

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U.S.C. 22.)

SEC. 117. CAPITAL GAINS AND LOSSES.

* * * * *

(j) [As added by Sec. 151(b), Revenue Act of 1942, c. 619, 56 Stat. 798] *Gains and Losses From Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for

sale to customers in the ordinary course of his trade or business.

(2) *General rule.*—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For the purposes of this paragraph:

(A) [As amended by Sec. 322(c)(3), Revenue Act of 1951, c. 521, 65 Stat. 452] In determining under this paragraph whether gains exceed losses, the gains described therein shall be included only if and to the extent taken into account in computing gross income and the losses described therein shall be included only if and to the extent taken into account in computing net income, except that subsection (d) shall not apply.

(B) Losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion.

* * * * * *

(26 U.S.C. 117.)

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IN THE

Supreme Court of the United States

October Term, 1959

No. 359

COMMISSIONER OF INTERNAL REVENUE

Petitioner

vs.

GILLETTE MOTOR TRANSPORT, INC.

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN RESPONSE TO PETITION

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The Respondent takes no issue with the presentation by the Petitioner of the matters relating to the opinions below, jurisdiction, statutes involved, or the question as presented. Hence, these subjects are omitted from this brief in accordance with Rules 24 and 40 of the Supreme Court of the United States.

STATEMENT OF THE CASE

In addition to the Statement of the Case as presented by the Petitioner, the Respondent wishes to clarify one point relating to the nature of the award in question, the tax consequence of which is the subject of this case.

The Final Determination of the Motor Carrier Claims Commission held that the Gillette Transportation system and "all of its property * * * were taken for the public use by * * * the United States" and that this taking required the "payment of just compensation to [Gillette] * * * under the terms of the Fifth Amendment to the Constitution of the United States." (R. 43). In fixing the amount of that just compensation for property taken the Commission undertook "to determine the value of the property on the date of taking" and then adopted fair rental value as a partial measure of the "value of the property so taken." (R. 43, 53).

ARGUMENT

This case presents a square conflict between two Courts of Appeals on the question of whether the award received by Respondent as Fifth Amendment compensation for the value of property taken from Respondent is entitled to be treated as capital gain, for income tax purposes, as gain from the involuntary conversion of property used in a trade or business as a result of requisition and seizure under Section 117(j). (The text of 117(j) is set forth in the Petition, Appendix B, at pp. 23-24.) Furthermore, this question is of substantial importance in that it involves an interpretation of the federal tax law provisions which are in issue in a substantial number of docketed and undocketed cases involving similar factual situations.

We believe that the Court below correctly decided that the Respondent is entitled to capital gain treatment. *United States v. General Motors Corporation*, 1945, 323 U. S. 373, 378, 65 S. Ct. 357, 89 L. Ed. 311; *Kimball Laundry Co. v. United States*, 1949, 338 U. S. 1, 5-7, 69 S. Ct. 1434, 93 L. Ed. 1765; *United States v. Dow*, 1958, 357 U. S. 17, 21, 78 S. Ct. 1039, 2 L. Ed. 2d 1109, 1114; *Youngstown Sheet & Tube Co. v. Sawyer*, 1952, 343 U. S. 579, 593, 615, 72 S. Ct. 863, 96 L. Ed. 1153; *Commissioner v. Southwest Exploration Co.*, 1956, 350 U. S. 308 at 315, 76 S. Ct. 395, 100 L. Ed. 347, 354. But we also recognize that in the interest of orderly justice and sound judicial administration it is important that a uniform rule be established by the United States Supreme Court which can be applied to all cases involving this same issue in similar situations.

CONCLUSION

Therefore, it is respectfully submitted that the Respondent has no objection to the granting of this petition for a writ of certiorari.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 359

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

GILLETTE MOTOR TRANSPORT, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum opinion and the amended opinion of the Tax Court (R. 138–139, 141) are not officially reported. The opinion of the Court of Appeals (R. 147–158) is reported at 265 F. 2d 648.

JURISDICTION

The judgment of the Court of Appeals was entered on April 1, 1959. (R. 159.) On June 24, 1959, by order of Mr. Justice Black, the time for filing a petition for a writ of certiorari was extended to August 29, 1959. (R. 159.) The petition for a writ of certiorari was filed on August 28, 1959, and was granted on November 9, 1959. (R. 160.) The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the Internal Revenue Code of 1939, an award made to a trucking company to compensate it for the seizure by the United States of possession and control of its system during a wartime strike was taxable as income or as a capital gain from an involuntary conversion.

STATUTE AND REGULATIONS INVOLVED

The pertinent statutory provisions and Treasury Regulations, Sections 22(a), 23(l) (1) and (2), 117 (a)(1) (A) and (B), (2), (3), (4) and (5), and (j) (1) and (2) (A) and (B) of the Internal Revenue Code of 1939, and Section 39.117(j)–1 of Treasury Regulations 118, are printed in the Appendix, *infra*, pp. 29–35.

STATEMENT

The stipulated facts (R. 59–138), as adopted by the Tax Court (R. 139) and restated in part by the Court of Appeals (R. 148–149, 158), may be summarized as follows:

At all pertinent times the taxpayer, a Texas corporation, was engaged in business as a common carrier of property by motor vehicle. Prior to August 11, 1944, the taxpayer owned and operated motor tractors, trucks, semi-trailers, pick-up trucks, and service cars. (R. 59–60.) From November 15, 1939, to August 11, 1944, the taxpayer and other motor carriers in the Midwest were operating under substantially similar contracts with a drivers' union. In 1943, a group of Midwestern carriers, including the taxpayer, sought to negotiate a separate contract with the union. Nego-

tiations deadlocked and the matter was certified to the National War Labor Board which decided that wage rates should be increased. Because of an alleged inability to pay the increases, the taxpayer continued to operate under the old contract until August 4, 1944, when the drivers went out on strike. (R. 61.)

On August 11, 1944, President Roosevelt issued an order directing the Director of the Office of Defense Transportation to take possession of and operate certain listed motor carrier transportation systems, including the taxpayer's, as long as necessary for the successful prosecution of the war. (R. 62–64.) On the same date, the Director of the Office of Defense Transportation sent the taxpayer a "Notice and Order Establishing Federal Possession and Control and Appointing a Federal Manager". (R. 65–66.)

The federal manager issued an order (R. 67–71) directing the motor transport companies to resume normal operations by the means customarily employed (R. 67). The order further recited that title to the properties and other assets would remain in the owners (R. 67), and that (R. 67, 68, 69):

> Possession by the United States is not exclusive, and the United States asserts, and will assert, only such control over the properties in its limited possession as may be necessary to accomplish the purposes of operation and of said Executive Order.
>
> * * * * * *
>
> All personnel, officers, agents and employees, employed by you in the operation of the said

> system, are called upon to resume or continue the performance of their usual duties and in the customary manner until otherwise ordered. No such officer, agent, or employee shall be deemed to be an official or employee of the United States.
>
> * * * * *
>
> * * * Each motor carrier shall be deemed to remain subject to suit in the same manner and to the same extent as it was so subject prior to the possession of its system and properties by the United States. * * *

Subject to their right to file written protests and objections to the federal manager's order, the carriers agreed to resume operations. (R. 73.)

Control of the taxpayer's motor transport system was maintained through the federal manager from August 12, 1944, to June 16, 1945. During this period, the taxpayer received orders and notices fixing wages, prescribing accounting methods, and in general regulating its operations. (R. 73, 74–75.)

During the period of Government use there was a critical shortage of motor vehicles of all types. There was a demand for vehicles of the type owned by the taxpayer. The taxpayer's vehicles were suitable for leasing and there existed on August 11, 1944, a rental market for the taxpayer's equipment. (R. 75.).

When control was restored to the carriers in 1945, the owners sought to negotiate for the payment of Fifth Amendment just compensation for the taking. Because each of the more than 100 cases would have required separate litigation in the Court of Claims, the trucking interests sought the intervention of Con-

gress. (R. 148.) Accordingly, the Act of July 2, 1948, c. 808, 62 Stat. 1222, established a Motor Carrier Claims Commission to hear and determine claims arising out of the Government's taking of possession and control, subject to review by this Court on writ of certiorari. (R. 89–92.)

The award of the Claims Commission in the taxpayer's case was handed down on May 19, 1952 (R. 80), and stated that the Government was indebted to the taxpayer in the amount of $195,361.92 "as rental for the use of petitioner's properties" (R. 77). This was based upon the rents the taxpayer could have obtained from a private lessee. (R. 75–76.) The award compensated the taxpayer only for the temporary use of its physical properties. (R. 77.) The Commission allowed the Government a credit against the award of $7,315.08 for operating profits realized during the period of control and which were left with the taxpayer, but also required as part of just compensation the payment of a sum equal to 4% interest on the net amount of $188,046.84, from the date of the return of the property (June 16, 1945) until the date of payment. (R. 76–77.) However, under a computation agreed upon by the parties to settle the many remaining claims, this amount was reduced to $122,926.21, plus an interest equivalent of $34,917.78, or a total of $157,843.99. (R. 158.)

The taxpayer received the $157,843.99 during 1952 (R. 139), and the Commissioner of Internal Revenue determined deficiencies in income tax for the years 1952 and 1953 based on his view that the entire award

was ordinary income in the year 1952 (R. 8–11). On the taxpayer's petition, the Tax Court followed its opinion in *Midwest Motor Express, Inc.* v. *Commissioner*, 27 T.C. 167, affirmed, 251 F. 2d 405 (C.A. 8), certiorari denied, 358 U.S. 875, a case involving "substantially identical" facts. (R. 139.) The Tax Court held that the taxpayer was required to report the transaction in 1952, and that the award for the Government's temporary use of the taxpayer's property, plus interest, was ordinary income under Section 22(a) of the 1939 Code and could not be treated as capital gain under Section 117(j) of that Code. (R. 139, 140, 141–142.)

The Court of Appeals, Chief Judge Hutcheson dissenting, reversed on the ground that the taxpayer's rights to property had been converted by governmental action into a claim for just compensation, and that "The just compensation received for the taking qualified under Section 117(j)." (R. 147–158.) The sole question before this Court is whether the court below erred in holding that the award, consisting of compensation for the Government's taking of the taxpayer's property for temporary use, plus interest, constituted capital gain.

SUMMARY OF ARGUMENT

A. The taxpayer received an award as compensation for the enforced taking for temporary use of its tangible property by the United States. The Government had held the assets for a period of ten months during the war emergency, and the Motor Carrier Claims Commission awarded compensation to the tax-

payer on the basis of the rental value of the property, plus interest at 4% per annum. The Court of Appeals erroneously held that this award was taxable as capital gain under 1939 Code Section 117(j).

Section 117(j) applies to only two types of property, namely, capital assets and property used in a taxpayer's trade or business of a character which is subject to the allowance for depreciation provided in Section 23(l) of the 1939 Code. If a net gain results from an involuntary conversion of such property, paragraph (j) of Section 117 treats the gain as capital gain from a sale or exchange. Before the enactment of that section, an involuntary conversion of capital assets could result only in ordinary income because there was no sale or exchange, and a sale of depreciable property used in a trade or business could likewise give rise only to ordinary income because that property is not a capital asset within the definition found in Section 117(a).

The court below erred in its application of Section 117(j) because, as shown in Points B and C, *infra*, the income represented by the award did not constitute a payment for an involuntary conversion of capital assets, but constituted compensation for the temporary possession and control of that property, and is therefore taxable as ordinary income. Furthermore, the property right which the Government took (the taxpayer's intangible property right as owner of the fee interest in tangible assets to possess and control those assets for the period of ten months) is not of a character subject to depreciation deductions.

B. The term "capital assets" as used in Section 117(j) is the same term as defined by Section 117(a). Accordingly, in order to decide whether "capital assets" were converted within the meaning of paragraph (j), the elements recognized as determinative in establishing "capital assets", as found in paragraph (a) of Section 117, must be applied.

Although Section 117(a)(1) defines "capital assets" as "property" held by a taxpayer, the word "property" is not all-inclusive. The purpose of Congress in allowing privileged treatment of the gain resulting from a sale or exchange of capital assets is to ameliorate the burden of taxing the gain at ordinary rates in the year of conversion when in fact the gain is due to appreciation in value during the period of investment. This Court has always construed and applied the definition of a capital asset so as to accord with that Congressional purpose. Accordingly, the problem in this case—to determine whether there has been a conversion of "property" within the meaning of the "capital asset" definition—must be solved on the basis of this guiding principle, *i.e.*, when gain is realized upon the conversion of assets which have appreciated in value, the gain is treated as capital gain, whereas the gain realized from the use of such assets is treated as ordinary income. Examples of the latter type of gains are rent and dividends.

Applying this principle, we reach the result that, although the taxpayer's right to use its tangible assets for a period of ten months is property in one sense, it is not the type of "property" that must be converted in the capital gains sense. The basic error of the court

below is its failure to recognize this distinction. The Motor Carrier Claims Commission awarded the taxpayer compensation for the Government's "use" of its property. The money thus awarded was paid in lieu of the rent the taxpayer could have received under a voluntary lease during the period of Government use. Rent is the consideration one person pays another for use or possession of his property. In essence, therefore, what the taxpayer received was remuneration for the use of its property, or rental payments taxable as ordinary income. What the taxpayer lost was the same thing it would have lost under a voluntary lease, *i.e.*, ten months' use of its tangible assets. The fact that the relationship was forced does not change the essential characteristics of the transaction for tax purposes.

Moreover, it does not matter what name is given the payments the taxpayer received. The income in question was not the result of the conversion of a capital investment but resulted merely from the use of that investment. The taxpayer was repossessed with the assets that produced the income (and with the appreciated value of those assets), and therefore the particular burden at which Section 117(a) is aimed is entirely absent.

C. The intangible property right of the fee owner of tangible assets to possess and control those assets for a period of ten months is clearly not property of a character which is subject to the allowance for depreciation under Section 23(l). The depreciable property that the taxpayer owned was its tangible assets. As shown in Point B, *supra*, that property

was not converted. The payment the taxpayer received was merely for the use of its depreciable tangible assets. It is only those assets which, so far as the taxpayer is concerned, were of a depreciable character. The court below agreed that the intangible interest here under discussion was not depreciable.

In enacting Section 117(j), Congress recognized that, when depreciable property appreciates in value, taxpayers are able to realize a gain upon the involuntary conversion or sale or exchange of that property. Thus, if the gain is taxed as ordinary income at the time of conversion, as it was before the enactment of Section 117(j), the same burden results as existed in the case of capital assets before the enactment of the capital gain provisions—the value, over and above the depreciated cost, that has appreciated over the holding period of the depreciable investment is all taxed in one year. By Section 117(j) Congress has ameliorated this burden with respect to depreciable property used in a trade or business by treating the gain from its conversion as capital gain.

As we have pointed out, the burden which Congress intended to ameliorate does not exist in this case. The taxpayer retained its depreciable tangible assets and, if there was any appreciation in value over its depreciated cost, that will be fully taken into account when the tangible property is sold or exchanged, or involuntarily converted.

ARGUMENT

THE COMPENSATION AWARDED TO THE TAXPAYER BY THE MOTOR CARRIER CLAIMS COMMISSION FOR THE FORCED TEMPORARY SEIZURE OF POSSESSION AND CONTROL OF THE TAXPAYER'S PROPERTY BY THE UNITED STATES IS TAXABLE AS ORDINARY INCOME RATHER THAN AS A CAPITAL GAIN

A. BEFORE THE TAXPAYER MAY TREAT THE AWARD AS A CAPITAL GAIN UNDER SECTION 117(J) OF THE INTERNAL REVENUE CODE OF 1939, IT MUST SHOW THAT THERE WAS AN INVOLUNTARY CONVERSION, THROUGH SEIZURE, OF ITS CAPITAL ASSETS OR DEPRECIABLE PROPERTY USED IN ITS TRADE OR BUSINESS

On August 11, 1944, the United States acquired control of the taxpayer's property, consisting of tractors, trucks, passenger vehicles, etc., for temporary use, and it returned control of the property to the taxpayer ten months later (R. 73–75). The Motor Carrier Claims Commission awarded the taxpayer compensation "as rental for the use of * * * [taxpayer's] properties", and also awarded 4% interest per annum from the date of relinquishment of Government control (R. 29–30, 77). Although, as a general rule, rent and interest are taxed at ordinary income rates under Section 22(a) of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 29),[1] the court below held that the taxpayer is entitled to treat the amounts received as capital gain under Section 117(j) of the 1939 Code (Appendix, *infra*, pp. 31–32).

Section 117(j) deals with only two types of property, namely, capital assets and property used in the

[1] See, for example, *Hort* v. *Commissioner*, 313 U.S. 28, 30–31, and *Kieselbach* v. *Commissioner*, 317 U.S. 399, 403.

taxpayer's trade or business which is subject to the allowance for depreciation under Section 23(l) of the 1939 Code (Appendix, *infra,* p. 29). Under this subsection, net gains from the involuntary conversion of such assets are treated as capital gains. Before the enactment of paragraph (j) of Section 117, the definition of a capital asset in Section 117(a) expressly excluded property used in the trade or business of a character subject to the allowance for depreciation under Section 23(l). (26 U.S.C. (1940 ed.) 117(a)). Accordingly, gain or loss resulting from transactions in such property resulted in ordinary gain or loss. H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 53–54, 96–97 (1942–2 Cum. Bull. 372, 415, 445–446). Additionally, only gains derived from the sale or exchange of a capital asset qualified for capital gains treatment—an involuntary conversion which did not amount to a sale could only give rise to ordinary income or loss. *Helvering* v. *Flaccus Leather Co.,* 313 U.S. 247, 249–251; *Dobson* v. *Commissioner,* 321 U.S. 231, 232; H. Rep. No. 2333, *supra,* pp. 53–54, 96–97 (1942–2 Cum. Bull. 372, 415, 445–446).

By Section 151(b) of the Revenue Act of 1942, adding paragraph (j) to Section 117 of the 1939 Code, Congress provided for limited changes in these rules. Property used in a taxpayer's trade or business of a character subject to the allowance for depreciation provided in Section 23(l) of the 1939 Code, after the addition of paragraph (j) to Section 117, was still excluded from the definition of a capital asset. See Section 117(a)(1)(B) of the 1939 Code (Appendix, *infra,* p. 30); S. Rep. No. 1631, 77th Cong., 2d Sess.,

p. 50 (1942–2 Cum. Bull. 504, 545). As previously stated, however, Section 117(j) provides that if a gain results from the sale or exchange or involuntary conversion of such property it will be treated as capital gain.[2] Further, Congress provided in that section that the involuntary conversion of capital assets as defined in Section 117(a)(1) will be treated as a sale or exchange of the capital assets, and that the resulting gain will be used in determining the net capital gains of the taxpayer under Section 117(j).

From this scheme of the statute, it is clear that in order for the taxpayer to treat the money received for the temporary use of its property as capital gain it must show, among other things: (1) that the property appropriated by the Government was a capital asset as defined in Section 117(a) or (2) that the property taken was used in the taxpayer's trade or business and was property subject to the allowance for depreciation provided in section 23(l).[3]

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[2] Congress, excluding depreciable property used in a trade or business from the definition of a capital asset found in Section 117(a)(1) of the 1939 Code, continued to allow losses from the sale or exchange of such property to be treated as ordinary losses. This was done to benefit businesses which, due to depressed conditions, are compelled to dispose of their plant or equipment. S. Rep. No. 1631, 77th Cong., 2d Sess., p. 50 (1942–2 Cum. Bull. 504, 545).

[3] Paragraph (1) of Section 117(j) of the 1939 Code provides that for the purpose of Section 117(j) the term "property used in the trade or business" means only property that is subject to the allowance for depreciation provided in Section 23(l). Paragraph (2) of Section 117(j) provides that a net gain resulting from the sale or exchange or involuntary conversion of property used in a trade or business shall be treated as capital gain.

The holding of the court below that the award is taxable as capital gain under Section 117(j) is in direct conflict with the decision of the Eighth Circuit in *Midwest Motor Express, Inc.* v. *Commissioner*, 251 F. 2d 405, certiorari denied, 358 U.S. 875, which expresses the correct rule. The conclusion of the court below is erroneous because, as is shown *infra*, the gain was not the result of an involuntary conversion of capital assets, but was compensation received for the use of the taxpayer's property, and is, therefore, taxable as ordinary income; and, further, the interest in the taxpayer's property taken by the United States for which the taxpayer received the amount in question "as rental", plus interest (R. 77), was not depreciable under Section 23(l) of the 1939 Code.[4]

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[4] The amount of the award which consists of interest is, in any event, taxable as ordinary income. That is so because the interest payment was made in lieu of what might have been earned on the principal sum had the taxpayer received it on the date of relinquishment of Government control, and was not paid for any alleged conversion of property. *Kieselbach* v. *Commissioner*, 317 U.S. 399, 403, 405; *320 East 47th Street Corp.* v. *Commissioner*, 243 F. 2d 894, 896–897 (C.A. 2); *Isaac G. Johnson & Co.* v. *United States*, 149 F. 2d 851, 852 (C.A. 2).

The total award made to the taxpayer as a result of the Motor Carrier Claims Commission's determination was $157,843.99. This consisted of $122,926.21, which was paid for the use of the taxpayer's tangible assets, and $34,917.78 which was paid as "interest" at 4% from the date of the Government's relinquishment of control to the date of the payment of the award. (R. 80.)

The Court of Appeals did not answer the interest question. Instead, it held (R. 158) that the Tax Court did not decide the question and therefore it was not before it on appeal. Accordingly, the case was remanded to the Tax Court (R. 158), apparently for the purpose of having it decide the interest question. However, this ruling of the court below is

B. THE INCOME REALIZED BY THE TAXPAYER WAS NOT THE RESULT OF A CONVERSION OF CAPITAL ASSETS INTO OTHER PROPERTY OR MONEY WITHIN THE MEANING OF SECTION 117(j)

1. *The term "capital assets" as used in Section 117(j) is the same term as that defined by Section 117(a) of the 1939 Code*

Section 117(j) applies to properties which are "capital assets held for more than 6 months," and treats gains from involuntary conversions of "capital assets * * * into other property or money" as gains from "sales or exchanges" of such assets. Section 117(j)(2) of the 1939 Code; Section 39.117(j)-1(a)(1)(ii) of Treasury Regulations 118 (Appendix, *infra*, p. 33). Before the enactment of Section 117(j), most involuntary conversions of capital assets were not considered "sales or exchanges" and hence any gain or loss as a result thereof could give rise only to ordinary gain or loss, for, as previously noted, only gains resulting from "sales or exchanges" of capital assets could qualify for the privileged capital gains tax. Section 117(a)(2) and (3), 1939 Code; *Dobson* v. *Commissioner*, 321 U.S. 231, 232;

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also erroneous. The Tax Court decided the interest question by expressly adopting its opinion in *Midwest Motor Express, Inc.* v. *Commissioner*, 27 T.C. 167, affirmed, 251 F. 2d 405 (C.A. 8), certiorari denied, 358 U.S. 875, as its opinion in this case. Hence, the finding of the Tax Court in the *Midwest Motor Express* case relating to interest is the finding here, namely, that (27 T.C. 167, 186):

"This sum represented part of the total compensation paid petitioner and regardless of whether it is called 'interest' or payments to meet the requirement of just compensation, it is income rather than capital gain. *Kieselbach* v. *Commissioner*, 317 U.S. 399."

That finding was appealed to the court below by the taxpayer. (R. 142-144.)

Helvering v. *Flaccus Leather Co.*, 313 U.S. 247, 249–251. The only change in the law, therefore, caused by the enactment of Section 117(j) with respect to property which is a capital asset was to treat an involuntary conversion of such property as a "sale or exchange" in order to afford capital gains treatment to net gains arising therefrom.[5] H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 53–54 (1942–2 Cum. Bull. 372, 415).

Accordingly, Congress did not extend or enlarge upon the definition of "capital assets", nor did it introduce any new theories respecting such assets other than those which underlie Section 117(a).[6] In order to decide a Section 117(j) question, it must therefore be determined whether there would have been a capital gain under the definition found in Sec-

[5] It should be noted that under paragraph (2) of subsection (j) of Section 117 net losses from involuntary conversions of capital assets and property used in a trade or business are still treated as ordinary losses just as under the prior law. See fn. 2 *supra*.

[6] That Congress, by its enactment of subsection (j) of Section 117, did not intend to introduce any new concept of the assets which constitute "capital assets" within the meaning of subsection (a) is made apparent by the terms of the new subsection. Thus, in defining "property used in the trade or business", Section 117(j)(1) (A) and (B) expressly states that such property must not be property of a kind which would properly be includible in inventory or property held primarily for sale to customers in the ordinary course of the taxpayer's trade or business. However, Section 117(j) nowhere contains a definition of "capital assets". The reason is that Congress, in referring to the term "capital assets", was referring to the term defined in Section 117(a), which definition, of course, excludes inventory property and property held by a taxpayer primarily for sale to customers in the ordinary course of his trade or business. Section 117(a)(1)(A).

tion 117(a) if a sale or exchange had occurred; if there would have been such a gain, then Section 117(j) treats an involuntary conversion as a "sale or exchange" and the taxpayer's gain is entitled to be taxed at the privileged rates. Hence, the principles which apply in determining the question under Section 117(a) are fully applicable here, except for the requirement that there be a "sale or exchange". See Section 117(a) (2) and (3).

2. *The definition of the term "capital assets"*

Section 117(a)(1) defines the term "capital assets" generally as "property" held by the taxpayer.[7] However, "property" as used in that section is not all-inclusive. The Congressional purpose in allowing a lower rate of taxation on the gain resulting from the conversion of capital assets is to ameliorate the burden which would be incurred by a taxpayer should that gain be classified as ordinary income in the year of a sale or exchange when the gain is due to appreciation in value over the period of investment, and to remove the deterrent effect of that burden on such conversions. *Commissioner* v. *P. G. Lake, Inc.*, 356 U.S. 260, 265, 266, rehearing denied, 356 U.S. 964; *Corn Products Co.* v. *Commissioner*, 350 U.S. 46, 52, rehearing denied, 350 U.S. 943; *Burnet* v. *Harmel*, 287 U.S. 103, 106, 111; *United States* v. *Snow*, 223 F. 2d 103, 109 (C.A.9), certiorari denied, 350 U.S. 831; *Fisher* v. *Commissioner*, 209 F. 2d 513, 514 (C.A. 6), certiorari denied, 347 U.S. 1014; *Boomhower* v. *United States*,

[7] Subparagraphs (A) and (B) of Section 117(a)(1) contain certain exclusions from this definition.

74 F. Supp. 997, 1001 (N. D. Iowa). This Court, in order to conform the statutory definition of "capital assets" to that Congressional purpose, has always narrowly construed the definition. *Corn Products Co.* v. *Commissioner, supra,* p. 52; *Commissioner* v. *P. G. Lake, Inc, supra,* p. 265.

The problem often presented, and which is raised in this case, is to determine whether a conversion of a taxpayer's capital investment has occurred. The controlling distinction (based on the principles discussed in the previous paragraph) is that, when gain is realized upon the conversion of assets which have appreciated in value and which otherwise meet the definition of "capital assets", the gain is treated as capital gain, whereas gain realized from the *use* of such an asset is treated as ordinary income. The latter type of transaction does not result in the burden aimed at by the capital gains provisions, and is therefore not accorded capital gain treatment. *Commissioner* v. *P.G. Lake, Inc., supra,* p. 266; *Burnet* v. *Harmel, supra,* p. 106; *United States* v. *Snow, supra,* p. 109; *Fisher* v. *Commissioner, supra,* p. 514; *Mathey* v. *Commissioner,* 10 T.C. 1099, 1105, affirmed, 177 F. 2d 259 (C.A. 1), certiorari denied, 339 U.S. 943; *Eaton* v. *Commissioner,* 10 T.C. 869, 881–882; Rev. Rul. 38, 1953–1 Cum. Bull. 16, 17. Cf. *Anderson* v. *Helvering,* 310 U.S. 404, 407; *Raytheon Production Corp.* v. *Commissioner,* 144 F. 2d 110, 113 (C.A. 1), certiorari denied, 323 U.S. 779; *Marcalus Manufacturing Co.* v. *Commissioner,* 30 T.C. 1345, 1350–1353, affirmed *per curiam sub nom. Marcal Pulp & Paper, Inc.* v. *Commissioner,* 268 F. 2d 739 (C.A. 3), certiorari denied,

December 14, 1959, No. 516, this Term.[8] Another way of putting the difference is to use the distinction between a "tree" and its "fruit" found in the assignment-of-income cases (see, for example, *Lucas* v. *Earl*, 281 U.S. 111, 115). In those terms, the conversion of the "tree" into gain results in capital gain; the conversion of the "fruit" of a tree into gain results in ordinary income.

These general principles are fully applicable to the present case. Although the intangible right of the taxpayer to use, for the period of ten months, assets in which it owned the fee may be considered property in one sense, it is not "property" which can be converted in the "capital gains" sense—as we shall show. The basic error of the court below is its refusal to recognize this distinction.

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[8] In a discussion by Professor Stanley S. Surrey of the results that would flow from an interpretation giving the word "property" in Section 117(a)(1) an all-inclusive meaning, the example of a claim for salary is used, but comparable reasoning would apply in the case of a claim for compensation for the use of property. Surrey's observations are as follows (*Definitional Problems in Capital Gains Taxation*, 69 Harv. L. Rev. 985, 988, fn. 7 (1956)):

"Thus, since a claim to salary is certainly 'property' in one sense of the term, the claim to salary would in that sense be a capital asset. While payment of the salary would not produce a capital gain because of the 'sale or exchange' requirement under the existing interpretation of 'exchange,' a sale of the claim would produce a capital gain under this interpretation of property. And, if this interpretation were adopted, we might well find a national brokerage business developing overnight through which employees sold their salary claims. In effect, the 'sale or exchange' requirement would not suffice to stem the capital gain flood waters if 'capital asset' were all-inclusive. * * *"

3. The award did not constitute a payment for an involuntary conversion of capital assets, but rather compensation for the use of tangible property, and is therefore taxable as ordinary income

The Government used the taxpayer's tangible property for a period of ten months (R. 77). The taxpayer was aware of the fact that the use was to be temporary and that the use by the United States was necessary due to the war emergency which existed at the time the strike occurred (R. 61–62, 64, 66). During the period of Government control, the taxpayer would have been able to rent its properties to private enterprise (if the Government had not intervened) since there was a demand for all of its equipment and there was a readily available rental market. A measure of the pecuniary loss to the taxpayer as a result of the enforced use was, therefore, the rent which the taxpayer could have obtained from a voluntary lease of its property. (R. 27, 29, 77.) The Motor Carrier Claims Commission held that the taxpayer's property which the Government appropriated was, under the circumstances of the taking, "access to the rental market for the component parts of its entire property" (R. 38), or ten months' use of its tangible assets (R. 29, 77). Indeed, the award received as a result of the Commission's determination was solely for the use of the taxpayer's property.[9]

[9] The award by the Commission was in satisfaction of the "just compensation" requirement of the Fifth Amendment which requires such compensation when there is a taking of private property for public use. Underlying that award are the following principles: when the Government takes only the temporary use of a tangible asset it does not take the asset itself, but only appropriates the intangible right of the owner to use

Therefore, when the total effect of the transaction is considered, the money received by the taxpayer represented remuneration for the use of its physical property for a certain period of time, and constitutes ordinary rental income. *Midwest Motor Express, Inc.* v. *Commissioner*, 251 F. 2d 405, 412 (C.A. 8), certiorari denied, 358 U.S. 875; Rev. Rul. 38, 1953–1 Cum. Bull. 16, 17. Rent is usually legally defined as the

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his asset over the period of Government control; accordingly, the owner cannot claim as just compensation the difference between the market value of the tangible asset at the time it was taken for use and that value at the time the asset is returned; instead, since the property "taken" is the same property that would be taken under a voluntary lease (*i.e.*, the temporary use of assets), the measure of compensation is usually the rent that probably could have been obtained under a voluntary lease. *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 6–7; *United States* v. *General Motors Corp.*, 323 U.S. 373, 377, 382–383.

It is possible, however, in a case of the taking of a temporary use, for the Government to be required to pay for a portion of the physical assets. This occurs where the Government damages the assets in excess of ordinary wear and tear. *Kimball Laundry Co.* v. *United States*, *supra*, p. 7. In the present case the taxpayer received no such special damages (R. 77), and therefore no portion of its tangible property was paid for. *Mathey* v. *Commissioner*, 10 T.C. 1099, 1105, affirmed, 177 F. 2d 259 (C.A. 1), certiorari denied, 339 U.S. 943. Cf. *Hamilton & Main, Inc.* v. *Commissioner*, 25 T.C. 878, 882; *Waggoner* v. *Commissioner*, 15 T.C. 496, 502.

It should be noted that both the court below (R. 150) and the Eighth Circuit in *Midwest Motor Express* v. *Commissioner*, 251 F. 2d 405, certiorari denied, 358 U.S. 875, held that the findings of the Motor Carrier Claims Commission were not *res judicata* of the tax issue in this type of case. The Eighth Circuit correctly pointed out (pp. 410–411) that the finding of the Commission that there was a taking of property does not determine whether and what property was converted within the meaning of Section 117(j).

consideration paid for use or occupation of property."[10] Black's Law Dictionary (Fourth ed.), p. 1461. Cf. *Burnet* v. *Harmel*, 287 U.S. 103, 111; *Hamilton & Main, Inc.* v. *Commissioner*, 25 T.C. 878, 882; *Waggoner* v. *Commissioner*, 15 T.C. 496, 502; *Eaton* v. *Commissioner*, 10 T.C. 869, 881–882. Here, the substance of the transaction was that the taxpayer lost what it would have lost under a voluntary lease, *i.e.*, the use of its assets for ten months, and taxpayer was paid what it would have been paid under such a lease. It retained the property which was used to give rise to the income and which represented its capital investment. In short, the taxpayer was put in the posi-

[10] It is to be noted that Congress has apparently viewed the transaction in question as resulting in the receipt of rent or payments substantially equivalent to rent. With respect to the question whether the payments in this case and cases like it should be reported as income in the year of receipt or whether they should be treated as if they were income during the period of Government control, Congress enacted Section 99 of the Technical Amendments Act of 1958, P. L. 85–866, 72 Stat. 1606. Under that section, the amount received by the motor carriers as compensation for the use of their property can be accrued, at their election, as income during the period of Government use. No mention is made of "gain", capital or otherwise, which, if we were dealing with the conversion of capital assets, would have to be computed with reference to the cost basis of the properties involved. This indicates that Congress, viewing the situation in its apparent aspects, treated the payments as compensation for the use of property, or substantially equivalent to rent. Indeed, the taxpayer does not really view the situation differently. It seeks to report the final award in its entirety and does not compute "gain" based upon the cost of assets, as would be necessary if any part of its capital investment were converted and gain resulted from appreciation in value over cost. The taxpayer merely seeks to have its tax liability lessened on the total amount of the award by obtaining capital gains treatment.

tion of a lessor who receives payment for the use of his property. See, for example, *Kimball Laundry Co.* v. *United States*, 338 U.S. 1, 7. The fact that the relationship was forced does not change the essence of what was taken and what was received in lieu thereof. It is well settled that when a sale is forced, such as in the case of a condemnation of a fee interest or a foreclosure, it is nonetheless a sale for tax purposes. *Helvering* v. *Nebraska Bridge Supply & Lumber Co.*, 312 U.S. 666, rehearing denied, 313 U.S. 598, reversing *per curiam*, 115 F. 2d 288 (C.A. 8); *Electro-Chemical Co.* v. *Commissioner*, 311 U.S. 513; *Helvering* v. *Hammel*, 311 U.S. 504, 510–511. See *Dobson* v. *Commissioner*, 321 U.S. 231, 232. Cf. *Kieselbach* v. *Commissioner*, 317 U.S. 399, 405. The same is true here: there was a forced lessor-lessee relationship for proper and imperative purposes, and the involuntary nature of the transaction did not change its essential attributes.

Moreover, it does not matter what the award is called. The crucial point is that the taxpayer retained the tangible assets (including any appreciation in the value of those assets) and the income did not result from the conversion of a capital investment, but resulted from its use. The burden Section 117(a) of the 1939 Code was intended to relieve is absent; there was no payment for an increase in value of property and, as in the case of taxation of rents, the taxation of this type of payment would not deter the conversion of capital assets. Under the principles discussed in Point B–2, *supra* (pp. 17–19), the income represented by the award is taxable at ordinary rates

under Section 22(a) and not at the privileged capital gains rates.

We submit that the Eighth Circuit in deciding this question in *Midwest Motor Express, Inc.* v. *Commissioner*, 251 F. 2d 405, certiorari denied, 358 U.S. 875, was correct in holding (p. 412) that:

> There was no conversion of capital assets within the meaning of Section 117(j). What the government had was an enforced temporary use of petitioner's [taxpayer's] transportation system during the war emergency. That there was a "taking" within the meaning of the Fifth Amendment is conceded but that "taking" should not be allowed to obscure the characteristics of what was taken by the government or received in lieu thereof by petitioner. Section 117(j) contemplates *capital* gains * * *. The Motor Carrier Claims Commission properly held that in the case of taking for temporary use the measure of just compensation was the fair rental value of the property used and that the rental value represented the petitioner's only money loss. * * * The just compensation paid for enforced operation amounted to a payment for use, an enforced use, it is true, but a use nevertheless. Practical considerations prohibit calling this use or rental payment an involuntary conversion of capital assets. * * * To allow that use payment to be denominated capital gain in order to arrive at a lesser tax rate would, in our opinion, be completely contrary to Congressional intent in enacting Section 117(j). * * *

C. THE TAXPAYER'S RIGHT TO USE ITS TANGIBLE ASSETS FOR A PERIOD OF TEN MONTHS WAS NOT PROPERTY OF A CHARACTER SUBJECT TO THE ALLOWANCE FOR DEPRECIATION PROVIDED IN SECTION 23(l) OF THE 1939 CODE

The inherent right of the fee owner of tangible property to use that property is not a property right subject to the allowance for depreciation provided in Section 23(l) of the 1939 Code. Indeed, it never has been held that the owner of a fee interest in property, the cost of which consists of the owner's outlay in order to acquire that property, owns by virtue of the acquisition any depreciable asset other than the property itself.[11] And the court below did not hold that the taxpayer's right to use its own tangible property was depreciable; instead, it held that the Government converted the taxpayer's capital investment. (R. 151–152, 153, 154, 158.) In our discussion under Point B, *supra,* we have shown that the taxpayer's investment was not converted. Here, we treat with the alternative basis, the conversion of property used in trade or business, and show that the interest here involved was not covered by Section 117(j) since the taxpayers' right to possession was not subject to depreciation.

We have pointed out that one of the purposes of Congress in enacting the capital gains provisions of the 1939 Code was to deal with the injustice of taxing

[11] This situation is to be distinguished from that in which a taxpayer purchases a lease which has a definite lifetime and is used in his business. In such cases the property purchased and subject to depreciation is the lease itself. *Dab* v. *Commissioner,* 255 F. 2d 788, 790 (C.A. 2); *Pekras* v. *Commissioner,* decided May 31, 1943 (1943 P-H T.C. Memorandum Decisions, par. 43,258), affirmed *per curiam,* 139 F. 2d 699 (C.A. 6).

the appreciation in value of "capital assets" as ordinary income in the year of their sale or exchange. Accordingly, gains resulting from the conversion of capital investments were given privileged treatment. Under Section 117(j) of the 1939 Code Congress treats the gain derived from depreciable property in the same manner as gains derived from the sale or exchange of capital assets. This was done because Congress recognized that when depreciable property appreciates in value taxpayers are able to dispose of such property at a gain over the depreciated cost. That is also true of depreciable property with an appreciated value which is involuntarily converted into other property or money. When the gain is taxed in one year at ordinary rates, as it was before the enactment of Section 117(j), the taxpayer has the same burden as in the case of the sale or exchange of capital assets before the enactment of the capital gains provisions. Section 117(j) ameliorates this burden in the case of depreciable property used in the taxpayer's trade or business. H. Rep. No. 2333, 77th Congress, 2d Sess., pp. 54, 96 (1942–2 Cum. Bull. 372, 415, 445); 1 House Hearings on Revenue Revision of 1942, pp. 197–198; *S.E.C. Corp.* v. *United States,* 140 F. Supp. 717, 718 (S.D.N.Y.), affirmed *per curiam,* 241 F. 2d 416 (C.A. 2), certiorari denied, 354 U.S. 909.

The taxpayer's tangible assets (which represent its capital investment) were property of the character that is depreciable under Section 23(l), and if the taxpayer's gain were due to the conversion of that property into other property or money the inequity that Congress ameliorated by Section 117(j) would

exist here—there would be a gain due to the appreciated value of the assets over their depreciated cost. However, as we have shown, the compensation for the Government's use of that depreciable property was not in payment for the appreciated value of the property over depreciated cost. The taxpayer retained the fee, and if there was any appreciation in value the taxpayer was left possessed of it. That appreciated value will be taken into account only when the tangible property is sold or exchanged or involuntarily converted. Cf. *Hort* v. *Commissioner*, 313 U.S. 28, 33. During the period the Government used the taxpayer's depreciable property (the tangible assets), the taxpayer had a right to depreciation deductions based upon its cost of acquiring that property, and, in fact, the taxpayer did take such deductions during that period. (R. 44–45.) See, for example, *Helvering* v. *Lazarus & Co.*, 308 U.S. 252, 254; *Weiss* v. *Wiener*, 279 U.S. 333, 336–337; *Alaska Realty Co.* v. *Commissioner*, 141 F. 2d 675, 677–678 (C.A. 6); *North Carolina Midland Railway Co.* v. *United States*, 163 F. Supp. 610 (C. Cls.). The fact that the Government did not pay for any depreciable property is made clear by the Motor Carrier Claims Commission's exclusion of depreciation of tangible property from the award. It did this in order to derive the "operating profit" (R. 29), which was credited against rental value (R. 44–45). Thus, the award was paid solely for the use of the tangible property and not for the conversion of that property.

In sum, the taxpayer's right to use its tangible assets was not of a depreciable character—the de-

preciable property was its tangible assets (representing its capital investment), which, as we have shown, were not converted. Hence, the Government at no time deprived the taxpayer of that property or its right to take depreciation on it.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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FEBRUARY 1960.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(l) [As amended by Sec. 121(c), Revenue Act of 1942, c. 619, 56 Stat. 798] *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

* * * * *

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) [As amended by Sec. 150(a)(1), Revenue Act of 1942, *supra*, Sec. 210(a), Revenue

Act of 1950, c. 994, 64 Stat. 906, and Sec. 322 (c)(2), Revenue Act of 1951, c. 521, 65 Stat. 452] *Definitions.*—As used in this chapter—

(1) *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

(B) property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), or real property used in his trade or business;

* * * * *

(2) *Short-term capital gain.*—The term "short-term capital gain" means gain from the sale or exchange of a capital asset held for not more than 6 months, if and to the extent such gain is taken into account in computing gross income;

(3) *Short-term capital loss.*—The term "short-term capital loss" means loss from the sale or exchange of a capital asset held for not more than 6 months, if and to the extent such loss is taken into account in computing net income;

(4) *Long-term capital gain.*—The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing gross income;

(5) *Long-term capital loss.*—The term "long-term capital loss" means loss from the sale or exchange of a capital asset held for more than

6 months, if and to the extent such loss is taken into account in computing net income;

* * * * * *

(j) [As added by Sec. 151(b), Revenue Act of 1942, *supra*] *Gains and Losses From Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

(2) *General rule.*—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or ex-

changes of capital assets. For the purposes of this paragraph:

(A) [As amended by Sec. 322(c)(3), Revenue Act of 1951, *supra.*] In determining under this paragraph whether gains exceed losses, the gains described therein shall be included only if and to the extent taken into account in computing gross income, and the losses described therein shall be included only if and to the extent taken into account in computing net income, except that subsection (d) shall not apply.

(B) Losses upon the destruction, in whole or in part, theft or seizure, or requisition or condemnation of property used in the trade or business or capital assets held for more than 6 months shall be considered losses from a compulsory or involuntary conversion.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 117.)

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939:

SEC. 39.117(j)-1 *Gains and losses from involuntary conversions and from the sale or exchange of certain property used in the trade or business.* (a)(1) The recognized gains and losses described in subdivisions (i) through (iv) of this subparagraph shall be treated as gains and losses from the sale or exchange of capital assets held for more than six months if the aggregate of such gains exceeds the aggregate of such losses. If the aggregate of such gains does not exceed the aggregate of such losses, such gains and losses shall not be treated as gains and losses from the sale or exchange of capital assets. The gains and losses referred to in this subparagraph are the following:

(i) Gains and losses from the sale, exchange, or involuntary conversion of "section 117(j) property", as defined in subparagraph (3) of this paragraph, held for more than six months.

(ii) Gains and losses from the involuntary conversion of capital assets held for more than six months.

* * * * *

(2) For the purpose of this section, the "involuntary conversion" of property is the conversion of such property into money or other property as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof. Losses upon the destruction in whole or in part, theft or seizure, requisition or condemnation of property are treated as losses upon an involuntary conversion whether or not there was a conversion of the property into money or other property. For example, if a capital assets held for more than six months, with an adjusted basis of $400, is stolen, and the loss from this theft is not compensated for by insurance or otherwise, the $400 loss is included in the computations under section 117(j)

(3) For the purpose of this section, the term "section 117(j) property" means property used in the trade or business of the taxpayer at the time of its sale, exchange, or involuntary conversion, which is of a character subject to the allowance for depreciation provided in section 23(l) or which is real property, except any such property which is within one of the following categories:

(i) Property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or which is held by the taxpayer primarily for sale to customers in the ordinary course of trade or business.

* * * * *

(e) The following examples will illustrate the operation of the provisions of section 117(j):

Example (*1*). A, an individual, makes his income tax return on the calendar year basis. A's recognized gains and losses for 1952 of the kind described in section 117(j) are as follows:

	Gains	Losses
1. Gain on sale of machinery, used in the business and subject to an allowance for depreciation, held for more than 6 months	$4,000	
2. Gain reported in 1952 (under sec. 44) on installment sale in 1951 of factory premises used in the business (including building and land, each held for more than 6 months)	6,000	
3. Gain reported in 1952 (under sec. 44) on installment sale in 1952 of land held for more than 6 months, used in the business as a storage lot for trucks	2,000	
4. Gain on proceeds from requisition by Government of boat, held for more than 6 months, used in the business and subject to an allowance for depreciation	500	
5. Loss upon the destruction by fire of warehouse, held for more than 6 months and used in the business (excess of adjusted basis of warehouse over compensation by insurance, etc.)		3,000
6. Loss upon theft of unregistered bearer bonds, held for more than 6 months		5,000
7. Loss in storm of pleasure yacht, purchased in 1950 for $1,800 and having a fair market value of $1,000 at the time of the storm		1,000
8. Total gains	12,500	———
9. Total losses		9,000
10. Excess of gains over losses	3,500	

Since the aggregate of the respective recognized gains ($12,500) exceeds the aggregate of such losses ($9,000), such gains and losses are treated under section 117(j) as gains and losses from the sale or exchange of capital assets held for more than six months.

Example (*2*). If in example (1) A also had a loss of $4,000 from the sale under threat of condemnation of a capital asset held for more than six months, then the gains ($12,500) would not exceed the losses ($9,000 plus $4,000, or $13,000). Neither the loss on such sale of

a capital asset nor any of the other items set forth in example (1) would then be treated as gains and losses from the sale or exchange of capital assets, but all of such items would be treated as ordinary gains and losses.

Example (3). A's yacht, used for pleasure and acquired for such use in 1945 at a cost of $25,000, was requisitioned by the Government in 1952 for $15,000. A sustained no deductible loss, and no loss with respect to such requisition will be included in the computations under section 117(j).

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No. 359

IN THE

Supreme Court of the United States

October Term, 1959

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

GILLETTE MOTOR TRANSPORT, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

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No. 359

COMMISSIONER OF INTERNAL REVENUE,

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GILLETTE MOTOR TRANSPORT, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

The Respondent, Gillette Motor Transport, Inc., takes no issue with the presentation by the Commissioner of the matters relating to the opinion below and jurisdiction. Hence these subjects are omitted from this brief in accordance with Rules 24 and 40 of the Supreme Court of the United States.

QUESTION PRESENTED

Whether the amount received by Gillette in 1952 as a result of the award by the Motor Carrier Claims Commission is taxable as ordinary income under Section 22(a) of the Internal Revenue Code of 1939, as the Commissioner contends, or whether it is taxable, as the taxpayer contends and as the Court below has held, as capital gain from an involuntary conversion (as a result of seizure or requisition) of property used in the trade or business of the taxpayer into money under Section 117(j) of the 1939 Code.

STATUTES INVOLVED

Section 117(j), Section 23(l) and Section 22(a), of the Internal Revenue Code of 1939 which are set forth in the Commissioner's brief.

STATEMENT OF THE CASE

In addition to the statement of the case as presented by the Commissioner, Gillette wishes to clarify a few points relating to the nature of the Government's action in 1944 and the nature of the award in question.

In conducting its transportation business from 1939 to August 11, 1944, Gillette owned and operated motor tractors, trucks, semi-trailers, pick-up and delivery trucks, and service cars. Gillette also owned certain real estate used as a terminal in the operation of its business and owned miscellaneous personal property, including office machines and equipment. These items were all used in Gillette's motor transportation system. A schedule listing a description of the property, acquisition date, depreciation allowed, and cost

basis as of August 11, 1944, is set forth in Exhibit 4D (R. 60, 83).

On August 11, 1944, J. M. Johnson, the Director of the Office of Defense Transportation, transmitted a telegram to Gillette which read in part (R. 64-65):

> "By order of the President and on behalf of the United States I have today issued an order taking possession and control as of 12:01 a.m. on August 12, 1944, of your motor carrier transportation system and all property used or useful in the operation thereof. * * *

In taking possession and control of Gillette's transportation system and all property used or useful in the operation thereof, the Director of the Office of Defense Transportation had acted pursuant to Executive Order No. 9462, also dated August 11, 1944, which stated in part as follows (R. 63-64):

> "NOW THEREFORE, by virtue of the power and authority vested in me by the Constitution and laws of the United States, including the Act of August 29, 1916, 39 Stat. 645, the First War Powers Act, 1941, and Section 9 of the Selective Training and Service Act of 1940 as amended by the War Labor Disputes Act, as President of the United States and Commander in Chief of the Army and Navy, *it is hereby ordered as follows:*
>
> "1. *The Director of the Office of Defense Transportation is authorized and directed,* through or with the aid of any public officers, Federal Agencies, or other Government instrumentalities, that he may designate, *to take possession and assume control of, and to operate, or arrange for the operation of, the motor carrier transportation systems of the motor carriers* named in the list attached hereto and made a part hereof, *including all real and personal property and other assets, wherever situated, used or useful in connection with the operation of such systems, in such manner as he may deem*

necessary for the successful prosecution of the war, and to do anything that he may deem necessary to carry out the provisions and purposes of this order.

* * *

"4. *Possession, control and operation* of any transportation system, or any part thereof, or any real or personal property, taken under this order *shall be terminated by the Director when* he determined that such possession, control, and operation are *no longer necessary for the successful prosecution of the war.*" (Emphasis added.)

Throughout his statement of facts and argument the Commissioner persistently alludes to the claim that "control" of taxpayer's property was taken—or that there was a taking for "temporary" use in a manner which implies that the award represents something other than the value of property taken. Yet the Motor Carrier Claims Commission, established to "hear and determine, according to law, existing claims against the United States arising out of these takings by the United States of possession and control of any of the motor carrier transportation systems * * *" (Ex. 5E, R. 60, 89), rejected the Government's argument that its actions merely amounted to a regulation rather than a taking of property (R. 33). The Claims Commission held that Gillette's transportation system and "all of its property * * * were taken for the public use by * * * the United States" as a result of this action by the Government, and that this taking of property required the "payment of just compensation to [Gillette] * * * under the terms of the Fifth Amendment to the Constitution of the United States." (R. 29). In fixing the amount of that just compensation for property taken the Commission undertook to "determine the value of the property on the date of taking" and then adopted fair

rental value as a partial measure of the "value of the property so taken and used." (R. 29, 36-37). The amount awarded, after being reduced as a result of stipulation, was $122,926.21 plus $34,917.78 which represented a sum which was "equivalent to interest at 4% per annum on the sum of $122,926.21 from September 28, 1945, to date of payment, said sum also being a part of just compensation."

SUMMARY OF ARGUMENT

The award which is the subject of the income tax litigation in the present case was granted by the Motor Carrier Claims Commission as compensation under the Fifth Amendment. It necessarily represents the value of the property rights taken as a result of the exercise of the power of eminent domain. The property rights taken by the Government were "property used in the [taxpayer's] trade or business".

The taking constituted a requisition or seizure within the meaning of Section 117(j)(2). Hence, the Fifth Circuit Court of Appeals was correct in holding that the petitioner is entitled to capital gain treatment under 117(j) as gain from the involuntary conversion of property into money.

I. The Motor Carrier Claims Commission expressly held that the compensation award granted by it to the petitioner under the Fifth Amendment represented the value of property taken. The nature of that award as determined by the Commission must be accepted as a predetermined fact for purposes of this case. Furthermore, even assuming arguendo, that the Commissioner may relitigate the nature of the award, the principles set forth in the case law of this Court, and the sound reasoning upon which those principles are

based, make it clear that the Fifth Amendment award received by the taxpayer necessarily represents the value of property taken as a result of the exercise of the power of eminent domain.

A person may transfer or dispose of property without transferring or disposing of the legal title (as the Commissioner here urges) to a physical thing and even without transferring his entire property rights in that thing. "Property", as ordinarily used in the law and as used in the Fifth Amendment, is a generic term which is not limited to physical things nor is it indivisible. Rather, the term "property" refers to the right of a person to use and possess a thing for some given period of time which lawyers call the individual's "interest" in the thing in question.

II. The term property, as used in 117(j) and as applied to the instant case, does not have any artificial or restricted meaning which differs from the ordinary legal usage of that term as illustrated by its usage in the Fifth Amendment, so long as it is "used in the trade or business". It is not limited to permanent legal title. Other interests may also come within this category if held by a business for productive purposes. Here the vehicles and equipment had been held and used over six months for productive purposes by Gillette in its own business. The property taken was depreciable. Upon the seizure and until termination thereof Gillette was deprived of this property.

III. At the core of this litigation is the fact that the Commissioner, notwithstanding the clear wording of the statute, has refused to recognize that a "sale or exchange" is not the only type of transfer or conversion which can produce capital gain treatment. The Commissioner has completely ignored the ordinary meaning of the statutory terms "seizure" and

"requisition" and has attempted to re-define the concept of involuntary conversion in terms of the "sale or exchange" requirements whereby "title" (which the Commissioner has equated with nonexistent permanent takings) must pass.

Prior to 1942, gains derived from the involuntary conversions *now enumerated* in 117(j) were entitled to capital gain treatment *only* when they happened to constitute a "sale or exchange". That is no longer true. — No sale or exchange is required. Sound policy reasons (i.e., the practical considerations overlooked by the Eighth Circuit) support the decision of Congress to accord this tax treatment to persons whose property is subjected to the sudden wartime and emergency needs of the Government as the result of seizure. *United States v. General Motors Corporation*, 323 U.S. 373, 65 S. Ct. 357 (1945); *United States v. United Mine Workers of America*, 330 U.S. 258, 67 S. Ct. 677 (1947); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S. Ct. 1434 (1949); *United States v. Dow*, 357 U.S. 17, 78 S. Ct. 1039 (1958).

ARGUMENT

GILLETTE IS ENTITLED TO TREAT THE AWARD AS AN AMOUNT RECEIVED FROM THE COMPULSORY OR INVOLUNTARY CONVERSION OF PROPERTY USED IN ITS BUSINESS AS THE RESULT OF A SEIZURE OR THE EXERCISE OF THE POWER OF REQUISITION.

On March 31, 1952, the Motor Carrier Claims Commission held that the transportation system of Gillette Motor Transport, Inc., the respondent or taxpayer here, including all of its property used and useful in the operation of that system, had been "taken for public use" by the United States on August 12, 1944; that such a taking and use constituted a taking of property for which just compensation must be paid to Gillette under the Fifth Amendment. See Final Determination of the Motor Carrier Claims Commission in *Gillette Motor Transport, Inc. v. United States* (decided March 31, 1952) (R. p. 29). The main argument of the Government before the Claims Commission had been that the federal manager's action "did not amount to a taking of its property but merely to regulation." R. 33. The Motor Carrier Claims Commission flatly rejected that argument and held as above indicated. It also ruled that just compensation for the taking of that property was *its fair market value* measured by rental value. In doing so the Commission reasoned that the renting of its property was one use for which Gillette's property was suitable and for which there was a demand; and that as applied to a taking of property for an indefinite period as was done in this case, the market value of the prop-

erty taken is normally the fair rental value which probably would be arrived at by a willing lessor and a willing lessee. See R. 32-37. The Commission relied heavily upon *United States v. General Motors Corporation*, 323 U.S. 373, 65 S. Ct. 357 (1945); *United States vs. Petty Motor Co.*, 327 U.S. 372, 66 St. Ct. 596 (1946); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S. Ct. 1434 (1949), and *United States v. United Mine Workers of America*, 330 U.S. 258, 67 S. Ct. 677 (1947).

I

The motor carrier award was granted to Gillette as compensation under the Fifth Amendment for the *value of the property* taken as a result of the exercise of the power of eminent domain.

A. *Ordinary legal meaning of "property" and of the taking of property.*

It has been the Commissioner's contention in this case and in the companion case decided by the Eighth Circuit that no "property" was taken from the taxpayer. Notwithstanding the ordinary legal meaning of "property",[1] the Commissioner (and the Eighth Circuit opinion upon which the Commissioner now relies) refuses to recognize that "property" simply means the right to use and possess a thing for a given

[1]The statement of this principle in Vol. 1, Tiffany, *Law of Real Property*, §2, is as follows:

"While it is usual to speak of the 'ownership of land', *what one owns is property not the land, but rather the rights of possession and approximately unlimited user, present or future.* In other words, one owns not the land, but rather an estate in the land. That is, in some degree, true of any material thing. *One owns not the thing, but the right of possession and enjoyment of the thing.*" (Emphasis supplied.)

period of time. This Court has made it clear: that there is a taking of "property" whenever a person is deprived of any property right or interest of any kind whatsoever, *such as the right to use and possess and dispose* of a physical thing either permanently or for a temporary period, as the result of the exercise of the power of eminent domain; that the ordinary legal meaning of the term "property" is not limited to things as such, but more accurately means a group of rights inhering in a person's relation to a thing; and that "property", as used in the Fifth Amendment, is addressed to every sort of interest that a person may possess whether title is taken or not.

In *United States v. General Motors Corporation*, 323 U.S. 373, 65 S. Ct. 357 (1945), where this Court defined "property" in the following manner at 65 S. Ct. 359:

> "The critical terms are 'property,' 'taken' and 'just compensation'. It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, *it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.* When the sovereign exercises the *power* of *eminent domain it* substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. In other words, *it deals with what lawyers term the individuals 'interest' in the thing in question, that interest may comprise the group of rights for which the short hand term is 'a fee simple' or it may be the interest known as an 'estate or tenancy for years', as in* the present instance. The constitutional provision is addressed to every sort of interest the citizen may possess." (Emphasis supplied.)

In defining the term "taken", this Court in the same case stated (65 S. Ct. 359-360):

> "In its primary meaning, the term *'taken'* would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. *The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking.* Governmental action *short of acquisition of title* or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." (Emphasis supplied.)

This Court has made it equally clear that the formalities chosen by the government in assuming the right to use and possession of property through the exercise of eminent domain do not affect the fact that a property right was taken nor do such formalities affect the rights of the parties. *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S. Ct. 596 (1946); *United States v. Westinghouse Electric and Manufacturing Co.*, 339 U.S. 261, 70 S. Ct. 644 (1950); *United States v. United Mine Workers of America*, 330 U.S. 258, 67 S. Ct. 677, 691 (1947); *United States v. Pewee Coal Co.*, 341 U.S. 114, 116, 71 S. Ct. 670, 671 (1951); *United States v. Dow*, 357 U.S. 17, 78 S. Ct. 1039, June, 1958.

In the *United Mine Workers* and *Pewee Coal* cases, the government directly appropriated and seized the use of the coal mine property without bothering to institute legal proceedings. In both cases, this Court emphasized that a "seizure" is complete even though title is not formally acquired by court proceedings and even though the mines were returned to the owners. The *United Mine Workers* opinion quoted with approval the following excerpt from the *Cpn-*

gressional Record wherein Senator Connally stated: "* * * but it does seem to me that the power and authority and sovereignty of the Government of the United States are so comprehensive that when we are engaged in war and a plant is not producing, we can take it over, and that when we do take it over, it is a Government plant, just as much as if we had a fee simple title to it, * * *." (89 Cong. Rec. 3811-3812). See also Id. at 3809, 3884, 3885, 5722.

The same principles were enunciated in the *General Motors* case where it was stated that: "Governmental actions short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

In the case of *United States v. Dow*, this Court again reiterated the same principle. There the government had assumed possession of privately owned property pursuant to a court order prior to the filing of any declaration of taking. The government argued that the date of filing, rather than the earlier date of possession, constituted the date of taking for purposes of determining just compensation, since "title" does not pass in such cases until funds are deposited pursuant to the declaration of taking. This Court rejected the argument of the government and held that the date of possession constituted the date of taking. As part of its reasoning the Court pointed out that property may be taken pursuant to the exercise of eminent domain by instituting court proceedings (condemnation) or by direct appropriation without instituting court action (seizure). The Court also stated that "the passage of title does not necessarily determine the date of 'taking', and to permit the date of passage of title pursuant to the declaration of taking to control where the government entered into possession at an earlier date, would

encourage manipulation "which could operate to the disadvantage of either the land owner or the United States."

B. *The nature of eminent domain, and the nature of the compensation derived therefrom.*

By asking the question "in lieu of what was the award made", the Eighth Circuit opinion in the companion *Midwest* case addressed itself to the correct question.[2] However, neither the Tax Court nor the Eighth Circuit ever squarely answered that question. For example, the Eighth Circuit opinion merely labeled the motor carrier award as a "rental payment" and a "payment for use" and generally implied that the compensation somehow represented loss of profits or income which the taxpayer would otherwise have received as evidenced by its citation and reliance upon *Mathey v. Commissioner*, 177 F. 2d 259 (1 Cir., 1949) affirming 10 T.C. 1099[2] and by its statement that the award "is no more a return for property condemned * * * than the $21,012.57 profits left with the business and credited against the gross award". What the Eighth Circuit evidently meant was that, even assuming arguendo, that property rights were taken, the money received by Gillette did not represent compensation for a property interest taken but rather represented compensation for the loss of income which Gillette would otherwise have received from the use of its property had there been no taking.

This line of reasoning fails to recognize that the compensation granted to one whose property is taken as the result of the exercise of the power of eminent domain necessarily represents the value of the property taken. It is a

[2] For discussion of *Mathey* case, see supra p. 18.

well-settled principle of law, that an eminent domain award represents the full and perfect value of the property taken. Loss of anticipated profits and anticipated income which would actually or probably have been received by the owner by using the property himself had it not been taken, can not as such even be an element in the award. Furthermore, anticipated profits and anticipated income are relevant (if at all) only as evidence which may be used in formulating a judgment as to the market value of the property right taken.

1. Where the entire right of use held by the transferor is taken.

A leading case in this area is *United States v. Miller*, 317 U.S. 369, 63 S. Ct. 276 (1943). In that case this Court pointed out that compensation paid under the Fifth Amendment is the value of the property taken, which in turn is measured by the market value of that property. In explaining the basis of this holding, the Court stated at 63 S. Ct. 279:

> "The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. *Such compensation means the full and perfect equivalent in money of the property taken.* Monongehela Navigation Co. v. United States, 148 U.S. 312, 326, 13 S. Ct. 622, 626, 37 L. Ed. 463 * * *" (Emphasis supplied.)
>
> "It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, *the courts early adopted, and have retained, the concept of market value.*" (Emphasis supplied.)

A lower Court case, which relies upon the reasoning of this Court, and which illustrates the nature of the compensation granted under the Fifth Amendment where productive business property is taken for the public use, is *Brooklyn Eastern Dist. Terminal v. City of New York*, 139 F. 2d 1007 (2 Cir., 1944). There the Court held that the measure of just compensation is the market value of the property taken, and that loss of profits of a business is not recoverable as an element of market value. In determining the measure of compensation to which the plaintiff was entitled, the Court stated that it must use as objective standards as possible under the circumstances to find a "fair equivalent in money's worth for the petitioner's loss"; that the concept of market value sets the practical standard for determining the owner's loss (citing *United States v. Miller*, supra); but that where the interest taken was not bought and sold on the market, the value must be somewhat hypothetical. "Loss of business profits as such is not allowable", the Court stated (citing *Mitchell v. United States*, 267 U.S. 341, 45 S. Ct. 293); but in default of more direct evidence of the value, present value (as of the time of taking) of clearly to be expected future earnings may be considered in arriving at the value of the property right lost.

Where the *actual* income from the property is used as the method of valuing the property taken, it is on the assumption that the net income capitalized is derived from the use to which the property is best adapted. For discussion see 4 *Nichols, Eminent Domain*, § 12, 312; and § 12, 314 at p. 90. And where the property taken has been leased near the punctum temporis of the taking, or where a fair market rental value can otherwise be established with reasonable certainty for the use to which the property is best adapted,

the capitalized rental value of the property right forms one of the best tests of the value of property. For discussion see 4 *Nichols, Eminent Domain*, § 12.312 and 12.314. E.g., *United States v. Shingle*, 91 F. 2d 85 (9 Cir., 1937); *In Re School of Industrial Arts*, 2 Misc. 2d 403, 154 N.Y.S. 2d 221.

Thus, while income attributable to the property as such from its highest and best use may be sound evidence upon which to base an estimate of the market value of the property interest taken, loss of anticipated profits or loss of anticipated income of the property taken or from a business located thereon is not recoverable *per se* as an element in an eminent domain award, and is relevant (if at all) only in so far as it tends to establish the value of the property.

2. Where the property is taken for an indefinite period.

Where an item of business property held for productive purposes is taken for an indefinite period, rather than permanently, the nature of the compensation is still the same, i.e., the market value of the property interest taken.

In a leading case, *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S. Ct. 1434 (1949), the government condemned a laundry plant for the use of the army for an indeterminate period, i.e., for a one-year term which the government could extend from year to year at the election of the Secretary of War. The effect of the taking was that the owners had no plant with which to continue in business during the period of the army occupancy. This Court held that the proper measure of just compensation is the transferable fair market "rental that probably *could* have been obtained" for the property right taken. In the *Kimball* opinion it was made

clear that an award granted under the Fifth Amendment represents the transferable value of the property right taken, and not a substitute for the anticipated actual profits or anticipated income which would have been received by the owner from his own use of the property if it had not been taken. In discussing the nature of an eminent domain award granted when property is taken for public use for an indefinite period, this Court stated at 69 S. Ct. 1437, 1438, that:

* * * * *

> *"The value compensable under the Fifth Amendment, therefore, is only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent.* Its measure is the amount of that equivalent. * * * But when the property is of a kind seldom exchanged, it has no 'market price', and then recourse must be had to other means of ascertaining value, including even value to the owner as indicative of value to other potential owners enjoying the same rights. Cf. Old South Association v. Boston, 212 Mass. 299, 99 N.E. 235. *These considerations have special relevance where 'property' is 'taken' not in fee but for an indeterminate period."* (Emphasis supplied.)

3. **The nature of the taxpayer's award, as determined by the Motor Carrier Claims Commission, must be looked to as the basic factor in determining the income tax consequences of that award.**

The fact that the eminent domain award which is the subject matter of this case necessarily represents the transferable value of the property right taken, rather than an award in lieu of the actual profits or income which the former owner anticipated receiving from using the property right himself, is of utmost importance.

The importance stems from the fact that the nature of the award or judgment must be looked to as the basic factor in determining the tax treatment of the proceeds. E.g., *Raytheon Production Corporation v. Commissioner of Internal Revenue*, 144 F. 2d 110 (1 Cir. 1944), cert. den. 323 U.S. 779, 65 S. Ct. 192 (1944);[3] *Mathey v. Commissioner*, 177 F. 2d 259 (1 Cir. 1949), affirming 10 T.C. 1099.[4] The nature of an *eminent domain* award does not in itself establish that the award is entitled to capital gain treatment under 117(j). But it does establish that the taxpayer's award must be

[3]In the *Raytheon* case the First Circuit held that the proceeds represented the value of good-will property which was converted into cash as a result of the destruction of said good will rather than loss of profits; and held that said proceeds therefore were taxable gain to the extent that the proceeds exceeded the provable cost basis. The Court pointed out that the introduction of evidence as to the income potential of the property in an effort to establish the value of the good-will property destroyed does not alter the fact that the award represented the value of the property destroyed.

Since the destruction of the property does not involve a "sale" (see Helvering v. William Flaccus Oak Leather Co., 313 U.S. 247, 61 S. Ct. 878 (1941)), and since the involuntary conversion provisions of 117(j) were not enacted until after the happening of the facts in the *Raytheon* case, there was no provision under which a capital gain issue could be raised there and the gain was therefore taxed as ordinary income.

[4]The *Mathey* case is factually in contrast to Raytheon in result reached, but involved the application of identical principles in holding that the award represented loss of future profits and income rather than a return of the capital investment in property. The reasoning of the Mathey opinion was that the taxpayer had sued for loss of future profits and income, that he received the award as loss of future profits and income, and that therefore the award must be taxed as such. This reasoning is absolutely sound as applied to the facts of the Mathey case since the court looked to the nature of the patent infringement award in question and taxed it as such. But the Mathey case *result* has no relevance in the instant case where the eminent domain award received by Gillette necessarily represents the value of property taken as a result of seizure or requisition, rather than loss of income.

taxed (if at all) as gain from the conversion of the property interest taken into money, just as the nature of the anti-trust claim in the *Raytheon* case determined that the proceeds from the settlement of that claim must be taxed (if at all) as gain from the "conversion thereby of his property into cash."

Furthermore, when an issue which has relevance to the taxability has been adjudicated in the proceeding which gave rise to the income or deduction, and when the parties to the tax case are the same or in privity with the parties to the earlier litigation, the principles of collateral estoppel bar either party from relitigating such issue. *Julian Lentin v. Commissioner*, 26 T.C. 112, aff'd 226 F. 2d 695 (7 Cir. 1955), cert. den. 350 U.S. 934, 76 S.Ct. 305 (1956). The parties to this case are the same or in privity with the parties in the Claims Commission case.

Hence, under the principles illustrated in the reasoning of the *Raytheon* case and under the principles of collateral estoppel, it must be accepted as a predetermined fact in this case that the award being taxed necessarily represents the value of the property taken from Gillette.[*]

The law as to this point is well summarized by the Fifth Circuit opinion in this case (Gillette). It reads:

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[*]The *Raytheon* principle and the doctrine of collateral estoppel distinguish the instant case from those cases which have dealt with the taxation of use and occupancy insurance policy proceeds under 112(f). In those cases the courts had to interpret the manifested intent of the parties, as expressed by the insurance contract, to determine whether the proceeds represented compensation for loss of profits which the taxpayer actually would have earned if the property had not been destroyed, or compensation for the value of the property destroyed. E.g., *Miller v. Hocking Glass Co.*, 80 F. 2d 436 (6 Cir. 1935); Merritt, *How the Proceeds of Use and Occupancy, or Business Interruption Insurance Are Taxed*, 36 Taxes 306.

"Now, seven years later [i.e., seven years after the Motor Carrier Claims Commission decision], the Government is again contending that there was no taking of property. In the context of this income tax case, the Government contends that what Gillette received as Fifth Amendment just compensation was not for the taking of its property, but merely for its *use*.

"We agree with the 8th Circuit that the problem may not be disposed of as one of res judicata, 251 F. 2d 405, 411. But we do not so readily put to one side, as that Court seems to do, the findings of the Claims Commission. What was taken and how it was taken was the subject of that inquiry and decision. The payments received which are here the subject of the income tax claim as income or as capital gains came into being from that Award. As the Motor Carriers Claims Commission it did not, of course, have statutory authority to determine tax matters or consequences. But as to a claim submitted to it, it had exclusive jurisdiction to determine whether there was a taking, what was taken, and what 'just compensation' was required. See United States v. Wheelock Bros. Inc., 1951, 341 U.S. 319, 71 S. Ct. 730, 95 L. Ed. 966." (R. 150)

It is now eight years later. The Commissioner, however, is still arguing that the Government took only limited possession and control and use of the petitioner's transportation system and other properties, and is still relying upon Operations Order No. I issued by the Federal Manager to support that conclusion. In so arguing the Government still refuses to squarely recognize that there was a taking of property as opposed to a mere regulation, and the Government in effect is questioning or relitigating the nature of the Government action which was determined adversely to the Government by the Motor Carrier Claims Commission.

Furthermore, even if it were appropriate to relitigate the nature of the Government action and the award, Operations Order No. I did not constitute the authority for or the act of seizure. The seizure order was the one issued by the Director of Defense Transportation pursuant to the executive directive of the President of the United States. The Operations Order was merely an administrative order issued after the seizure.

II

The wording of 117(j) requires that the Gillette award be accorded capital gain treatment as gain from an involuntary conversion of property into money.

The property taken by the government was used in Gillette's business and was converted into money as the result of one of the events enumerated in 117(j)(2) which reads in part as follows:

> "(2) General Rule.—If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, *plus* the recognized *gains from the compulsory or involuntary conversion (as a result of* destruction in whole or in part, theft or *seizure*, or an exercise of the power of *requisition* or *condemnation* or the threat or imminence thereof) *of property used in the trade or business* and capital assets held for more than 6 months *into* other property or *money*, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses *shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months.* If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets. For the purposes of this paragraph:

"(A) In determining under this paragraph whether gains exceed losses, the *gains described therein* shall be included only if and to the extent taken into account in computing gross income and the losses described therein shall be included only if and to the extent taken into account in computing net income, except that subsection (d) shall not apply.

"(B) *Losses upon* the destruction, in whole or in part, theft or *seizure*, or *requisition* or condemnation of property used in the trade or business or capital assets held for more than 6 months *shall be considered losses from a compulsory or involuntary conversion.*" (Emphasis supplied.)

A. *The property converted as a result of the taking was of the character contemplated by 117(j), i.e., property used in the taxpayer's trade or business.*

The term "property used in the trade or business" as used in 117(j) is defined as follows:

"(1) *Definition of property used in the trade or business.* — For the purposes of this subsection, the term 'property used in the trade or business' means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), held for more than six months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business." (Emphasis supplied.)

Here it was stipulated (Jt. Stip., par. 4, p. 60, and Ex 4-D, p. 83) that the trucks and other equipment which were

the subject of the Government seizure had been held for productive business purposes by Gillette for use in conducting its transportation business, and that Gillette had been taking an allowance for depreciation as a deduction. The Commissioner does not dispute, and in fact assumes, that prior to the Government action Gillette held "property used in a trade or business" or purposes of 117(j) and was entitled to a depreciation deduction under 23(l). The vehicles and equipment were subject to exhaustion and consumption through wear and tear and use over a period of time and were therefore of a character subject to depreciation.

Nevertheless, the Commissioner contends that the "taxpayer's right to use its tangible assets" for a temporary period "was not property of a character subject to depreciation provided in 23(l) of the 1939 Code."

Even assuming, arguendo, that the Commissioner were justified in categorizing the indefinite taking as a "temporary" right of use and possession, that in itself has no bearing on whether that property was depreciable in character. For example, a party purchasing a leasehold for business purposes for a lump sum consideration merely obtains temporary right to use and possession, but the property interest so acquired is depreciable in character and its cost may be recovered by annual deductions for depreciation spread over the term of the lease. *Dab v. Commissioner*, 255 F. 2d 788 (2 Cir. 1958). What is strange is that the Commissioner (fn. p. 25, Brief) acknowledges that a temporary right of use and possession acquired under a lease (the "lease itself" in the Commissioner's language) may constitute depreciable property. Yet the Commissioner insists throughout his brief that the property interest acquired from Gillette by the Government was not "depreciable property"

merely because of the claim that only temporary right to use and possession was taken.

The same argument before the Court of Appeals was there squarely rejected in the following language:

> "The exclusive dominion, control and direction covered all of Gillette's property, including specifically 55 tractor-trailer combinations, 14 spare tractors, 23 pickup delivery trucks, and 5 passenger service vehicles. In ascertaining just compensation on the vicarious rental value on the industry-accepted mileage basis, the Commission found that the tractors and trailer vehicles would have been leased on a minimum of 5,000 miles per month. That means that for the roughly ten months of the seizure these 69 over-the-road vehicles traveled, or would be expected to travel, over 3,450,000 miles. In that operation the Government got something more than use, i.e., carrying capacity of the vehicles. Unlike 'the wonderful one-hoss shay * * * that * * * ran a hundred years to a day' and 'went to pieces all at once—all at once, and nothing first, just as bubbles * * * when they burst,' each mile operated used up a part of the economic life of the vehicle. The part thus 'consumed' could not be returned. It was lost and gone forever." (R. 157)

The Commissioner argues (p. 27 Brief) that "the taxpayer had a right to depreciation deductions * * *, and, in fact, the taxpayer did take such deductions during that period." Such an argument begs the question.[6]

[6] A lessor, while ordinarily entitled to take a depreciation deduction, is not entitled to such deduction during the term of a lease if the value of the lessor's property at the time the lease was executed should be restored to it at the time the lease expires, because the lessor has suffered no economic loss as a result of exhaustion: *Commissioner v. Terre Haute Electric Co.*, 67 F. 2d 697 (7 Cir., 1933), cert. den. 292 U.S. 624, 54 S. Ct. 629. Also see Annotation, 40 A.L.R. 2d 440, 454-56.

Certainly these trucks of Gillette that the Government seized were not in the same condition when returned as when seized. Although the record is barren as to the fact, some of these vehicles easily could have been nothing but junk when returned. The fact is that *all* of petitioner's property for which it received this award was taken for an indefinite period. A taking of use, possession and control under eminent domain for an indefinite wartime period, giving the Government authority to do with it whatever it deems "necessary for the successful prosecution of the war" rather clearly constitutes a taking of all incidence of ownership of any value.

B. *The action of the Government in taking petitioner's property constitutes a typical example of seizure or requisition within the meaning of Section 117(j).*

The Eighth Circuit opinion in the *Midwest* case recognizes that there is an "involuntary conversion" for purposes of 117(j) if the conversion is "as a result of * * * a seizure or exercise of the power of requisition or condemnation or the threat or imminence thereof", but the Eighth Circuit concluded (quoting the Tax Court) that the "United States did not convert any of the petitioner's assets * * * by requisition or threat of condemnation". The Court reasoned that, since the "petitioner retained title to its properties", the taking consisted of the temporary control and operation of the petitioner's transportation system for a temporary period not a "condemnation or conversion". This reasoning is clearly erroneous.

The Government's action in this case was a "requisition" or "seizure" within the meaning of 117(j)(2). The paren-

thetic language in the body of 117(j)(2) makes it clear that gains resulting from "requisitions" and "seizures" constitute involuntary conversions of property into money for purposes of that section, since those two events (along with condemnation and destruction and theft) *are enumerated as involuntary conversions* in the non-recognition provisions of 112(f) and the capital gain provisions of 117(j). See *Helvering v. William Flaccus Oak Leather Co.*, 313 U.S. 247, 61 S. Ct. 878 (1941). Neither 112(f) nor 117(j) define "requisition" or "seizure". In the absence of a definition these terms must be given their ordinary meaning, just as the term sale must be given its ordinary meaning where it is used in the Revenue Act. The courts are not free to adopt a restricted or an artificial meaning for a word unless the ordinary and usual meaning would lead to absurd results or thwart the purpose of the Act as disclosed by the structure of the Act. *Helvering v. Hammel*, 311 U.S. 504, 61 S. Ct. 368 (1941).

Seizures or requisitions generally are neither temporary nor permanent at the outset and have little if anything to do with "legal title". Rather, they ordinarily refer to the entry into use and possession without the authority of a court order for indefinite wartime or emergency periods. They become temporary or permanent in particular instances depending upon whether the emergency which produced them happens to terminate before the useful life of a given item involved in a particular seizure has been fully consumed and exhausted.

This Court has pointed out that the Governmnt may take property pursuant to the power of eminent domain either (1) by "condemnation", or (2) by physical "seizure". It has defined "condemnation" as the entering into possession of

property pursuant to a court order. It defined "seizure" as the entry into possession without authority of a court order (and hus without passage of title). *United States v. Doe*, 357 U.S. 17, 78 S. Ct. 1039 (1958).

The Lands Division of the Justice Department made a similar distinction in its publication entitled *Acquisition of Propery for Wartime Purposes* (U. S. Government Printing Office, 944) at pp. 42 and 43.

Certain aspects of the problem of seizures of private property wee exhaustively considered by this Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863 (1952). The several opinions of this Court in the *Youngstown* case characterized the action of the Government there as a "seizure' In that case the President had directed the Secretary of Commerce to "take possession of and operate the plants and facilities" of certain steel companies where production was halted due to a labor dispute. The order provided that the "possession and operation of such plant, facility or other property" of each company should be returned when further possession of that property was no longer necessary to the national defense. Appendix I of Mr. Justice Frankfurter's concurring opinion consists of a synoptic analysis of legislation authorizing seizure of industrial property from 1862 through the Defense Production Act of 1951. Appendix II of the same opinion contains a summary of seizures of industrial plants and facilities by the President from 1861 through 1952. One of the 84 seizures listed by Mr. Justice Frankfurter is the very same one that is the subject matter of this litigation—"Midwest Trucking Operators". Certainly, in view of the definition of seizure by this Court in the *Doe* case and in view of the authoritative analysis of seizure by this Court in the *Youngstown* opinions and

appendices, Gillette's property was taken as a result of "seizure"—identically the same word used in Section 117(j).

An illustration of Congressional awareness of the ordinary and synonymous usage of the terms "seizure" and "requisition" is found in the transcript of the 1941 *Hearings Before the U. S. Senate Committee on Military Affairs* dealig with S. 1579, a bill to authorize the President of the United States to requisition certain property for the use of or disposition by the United States. At page 231 of the transcript, Senator Lodge, Senator Chandler, and Secretary of War Ptterson agreed that that requisitioning bill, as then drafted, probably authorized the "seizure of transportation facilitiessuch as steamships and railroads." See Appendix B.

The Appendix materials found herein make constant reference to requisitioning and seizure, as connoting te taking of use and possession for temporary or indefinite periods. The requisitioning statutes there cited make reference to power of the President; to requisition items for "the use of" the United States; to "take possession and assume control"; to "requisition and take over"; and to "take possession and use of" certain items. The items which could be requisitioned under these statutes included entire plants and pats thereof, dry docks, vessels, transportation systems, and lmost any other item which might be necessary for wartime or emergency purposes.

The materials set torth in Appendices A an B demonstrate full well that Congress was well aware f the usual and normal meaning of "seizure" when it enated Section 117(j). Certainly it must have intended that seizures such as were involved should be afforded capital gai treatment.

Even if the wording of 117(j) were not so secific in defining the meaning of "conversion" by enumerating the trans-

actions or events which give rise to such involuntary conversions of property into money, there is nothing in the ordinary meaning of conversion, as used in other fields of law, which would suggest that there must be a permanent taking of title to the entire remaining useful life of the property right held by the transferor before there is a conversion of property.

In the context of tort and trover situations conversion means "any unauthorized act which deprives an owner of his property permanently or for an indefinite time." E.g., *Black's Law Dictionary*, p. 402 (4th Ed.); *Quaker Oats Co. v. McKibben*, 230 F. 2d 652, 654 (9 Cir. 1956). Any appropriation of property without the consent of the owner, to one's own use and benefit, or to its destruction, or in exercising dominion over it in exclusion or defiance of the rights of the lawful owner or possessor, amounts to a conversion. E.g., *Peck v. Patterson*, 119 Vt. 280, 125 A. 2d 813; *Jensma v. Allen*, 248 Ia. 556, 81 N.W. 2d 476, 480 (1957).

The cases cited above are all illustrations of the fact that conversion is typically associated with depriving an owner of his right to possession and use of his property for any length of time without his consent. An owner whose property is converted may or may not have had "title"; the "Gist" of conversion is associated with possession, not title. *Kaufman v. Provident Sav. Bank & Trust Co. of Cincinnati*, 23 N.Y.S. 2d 637, 644-647. Perhaps the clearest statement as to the nature of conversion is the language quoted with approval in *Even-Heat Co. v. Wade Electric Products Co.*, 336 Mich. 564, 58 N.W. 2d 923, 927 (1953):

> " 'In Daggett v. Davis, 53 Mich. 35, 18 N.W. 548, 51 Am. Rep. 91, Chief Justice Cooley, speaking for the court, said:

> " 'But conversion does not necessarily imply a complete and absolute deprivation of property; *there may be a deprivation which is only partial or temporary,* and where the property of the plaintiff remains in or is restored to him. * * * An illustration is where one hires a horse for one use, and puts it to another, subsequently returning it to the owner. * * * The difference between such a case, and the one in which the property is wholly made away with, is one affecting the damages only; the damages go to the whole value of the property in the one case, and are commonly less in the other. * * *' " (Emphasis added.)

C. *Sound tax policy considerations support the taxpayer's contention that the ordinary meaning of the terms requisition and seizure should be adopted when interpreting 117(j).*

Relevant policy considerations support the adoption of the ordinary meaning of requisition and seizure as already defined, under which the taxpayer in the instant case is entitled to capital gain treatment. There are several practical tax policy considerations which make it wise and desirable to grant capital gain treatment to owners of business and other productive properties who have suffered the hardship of having the use and possession of their property forcibly taken for a temporary or an indefinite wartime period.

The reasoning in *Benedict v. United States,* 271 F. 714 (D.C. E.D. N.Y., 1920) is relevant here. In that case the District Court pointed out that a requisition is not a taking under agreement and the acquiescence on the part of a citizen to the taking of his property by the sovereign is not the equivalent of the making of a contract because it is a "one-sided exercise of authority." The fact that it is a "one-sided

exercise of authority" makes it reasonable to tax the proceeds resulting from a requisitioning for a temporary or indefinite use by the government at more favorable rates than the rental from a lease voluntarily entered.

The Eighth Circuit indicated that "practical considerations" prevented the application of 117(j) to the award received. Here "practical considerations" insofar as they are relevant at all, are in favor of the taxpayer.

The difficult plight of one who has had property interests requisitioned or condemned by the Government for a temporary or an indefinite period was recognized in *United States v. General Motors Corporation*, 323 U.S. 373, 65 S. Ct. 357 (1945). There the Court modified the general rule that consequential damages are not allowed to be considered in determining the value of the property rights taken. The Court held that, although one whose entire remaining interest is terminated by Government condemnation action is not entitled to receive any consequential damages as part of his compensation, *it is another matter when the Government does not take his entire interest but rather chops it into bits and winds up taking only a temporary right to use and possession.*

In *Kimball Laundry Co. v. United States*, 338 U.S. 1, 69 S. Ct. 1434 (1949), this Court again recognized that the financial strain upon a business whose property is taken for an indefinite period is likely to be more severe than the strain upon one whose occupancy is finally severed. In reversing the decision of the Eighth Circuit, this Court held that Kimball was entitled to have the value of its trade routes, which for all practical purposes were pre-empted because Kimball was left without a laundry to serve them, considered in determining the transferable value of the property

right taken. The language of this Court clearly indicated that it appreciated the difficult business position in which one whose property is taken for an indefinite period is placed. At 338 U.S. 15, 69 S. Ct. 1442, this Court stated as follows:

> "* * * The temporary interruption as opposed to the final severance of occupancy so greatly narrows the range of alternatives open to the condemnee that it substantially increases the condemnor's obligation to him. It is a difference in degree wide enough to require a difference in result."

The swiftness with which wartime takings are accomplished creates considerable hardship in itself, and this hardship is aggravated when payment is delayed. See Lands Division of Department of Justice, "*Acquisition of Property for Wartime Purposes*" (1944), p. 97; Just, *Condemnation Procedure During World War II*, 12 Geo. Wash. L. Rev. 286; Littel, *National Real Estate Journal* (Jan., 1943), p. 9; Dolan, *Present Day Court Practice in Condemnation Suits*, 31 Va. L. Rev. 9.

The motor carrier claims payments are shining examples of compensation which was not granted until long after the items had been taken. Gillette's properties were taken in August of 1944 and yet Gillette was not compensated until 1952, eight years after the event.

The apprehensions expressed by Senator Downey and the Chairman of the Senate Committee on Military Affairs during Senate hearings on S. 1579 (which was enacted as the Requisitioning Act of October 16, 1941) are an example of the attitude of the nation in 1941 which led to the enactment of 117(j). This testimony illustrated that seizure was considered as an "extraordinary power," that it could cause

heavy consequential damages over and above the compensation which would be awarded for the value of the property, that it could result in certain large businesses obtaining the use of critical tools owned by smaller competitors who were less able to assume large government contracts, and that the requisitioning of productive properties used by a business was looked upon as causing greater sacrifice and hardship than if inventory or raw materials were taken. Excerpts from this Senate testimony may be found in Appendix B.

III

By holding that the "taking" did not amount to an "involuntary conversion", the Tax Court and Eighth Circuit attempted to judicially rewrite the plain wording of 117(j) in a manner which in effect deletes the terms requisition and seizure therefrom.

The conclusion of the Tax Court in this case (as well as its and the Eighth Circuit's holding in *Midwest Motor Express, Inc. v. Commissioner*, 27 T.C. 167, aff'd. 251 F. 2d 405), that the taking or transfer did not amount to an "involuntary conversion," of property for purposes of 117(j) is based upon two premises; namely, (1) a belief on the part of those Courts that the fact situation in the instant case would not amount to a "sale or exchange" within the usual capital gain provisions of the Internal Revenue Code, and (2) capital gain treatment is not applicable in the instant case because of the absence of a sale or exchange. The arguments now advanced by the Commissioner as reasons for denying that Gillette is entitled to capital gain treatment in the instant case rest upon the same two premises and have their origin in cases which hinged upon whether there was a conversion by "sale or exchange".

Thus the Commissioner contends that what "the taxpayer lost was the same thing it would have lost under a voluntary lease"; that "the money was paid in lieu of the rent which the taxpayer could have received under a voluntary lease"; that the government appropriated "access to the rental market"; that the taxpayer "was paid what it would have have been paid under such a [voluntary] lease"; that the award was received "as rental"; that "title to the properties and other assets" was not transferred and would remain in the owner; and that "of course rent is ordinary income rather than capital gain."

The situation might be different if Gillette had been in the business of renting vehicles and equipment and had held the vehicles and equipment for rental purposes at the time the Government seized the property. Were that the case, the Commissioner might be justified in then arguing, as he does here, that the award was received in lieu of rental income; that rental was Gillette's normal source of business income; and that therefore (notwithstanding the ordinary meaning of the statutory wording) it should be presumed because of practical tax policy considerations for purposes of 117(j): (1) Gillette did not lose "property used in the trade or business of the taxpayer"; and (2) the property which was converted was *not* property used in the trade or business of Gillette. Such reasoning is based upon analogy to the *Hort* and *Corn Products* cases[7] which involved, however, transactions which were freely and voluntarily entered into by both parties.

[7] *Hort v. Commissioner*, 313 U.S. 28, 61 S. Ct. 757 (1941), affirming 112 F. 2d 167 (2nd Cir. 1940) and 39 BTA 922; *Corn Products Refining Co. v. Commissioner*, 350 U.S. 46, 76 S. Ct. 20 (1955).

Given an eminent domain award, and given the fact that Gillette was not in the business of renting, the Fifth Amendment award received by Gillette did not and could not have represented a substitute for ordinary income. The continual effort of the Government to inject the foregoing argument into the facts of this case is both arbitrary and unreasonable. As stated by the Fifth Circuit in this case: (R. 156-157)

> "That would most certainly be pertinent here for the facts are uncontradicted that Gillette was happy as a transport company. It wanted to remain in that business. So much so did it desire to continue, that it and others had the courage collectively to challenge demands of labor organizations which were deemed inequitable. It refused to budge. The Government took over. This is relevant because Gillette was not in the business of renting its equipment. It was an operator and wanted to continue to be one. The Government could not compel it to be a renter—i.e., a lessor. It could, of course, by its sovereign power, take, either permanently or indeterminately. But the taking was not a lease, and its obligation was not to pay rent, but to pay just compensation for the value of that right."

In cases where capital gain treatment properly hinges upon the existence of a conversion by "sale or exchange", the Commissioner's arguments are relevant. In such cases, for instance, it is important whether "title" has been (or is being transferred. *Benton v. Commissioner*, 197 F. 2d 745 (5 Cir., 1952); *Breece Veiver & Panel Co. v. Commissioner*, 232 F. 2d 319 (7 Cir., 1956); *Oesterreich v. Commissioner*, 226 F. 2d 798 (9 Cir., 1955). Likewise, in such cases it is sometimes relevant to argue that the gain is essentially a substitute for rental payments which the taxpayer would actually or probably have received in the future and that

therefore it is not gain from a "sale or exchange". See *Hort v. Commissioner*, 313 U.S. 28, 61 S. Ct. 757 (1941).

In contrast, the Fifth Circuit opinion in the instant case, pointed out that the "gossamer distinctions" and "metaphysical dialectic" advanced by the Commissioner's brief, "ignore the language of Section 117(j) which expressly expands [capital gain] relief beyond 'sales or exchanges' " to include seizures and requisitions.

In some cases the various involuntary conversions enumerated in 117(j) overlap and also constitute sales or exchanges. For instance, forced transfers of complete title by condemnation proceedings, as well as by foreclosure, are "sales" within the meaning of tax provisions which grant capital gain treatment to gains from the sales or exchange of capital assets. E.g., *Hawaiian Gas Products v. Commissioner of Internal Revenue*, 126 F. 2d 4 (9 Cir., 1942); *Helvering v. Hammel*, 311 U.S. 504, 61 S. Ct. 368 (1941); 3B Mertens, *Law of Federal Income Taxation* (1958 Ed.) §22.92, p. 344-345, n. 97-98. But all involuntary conversions are not also "sales or exchanges". Property may be converted into money in several ways. One way is by sale or exchange. Other ways, including requisition, seizure and destruction, are enumerated in the parenthetic language of 117(j). If a fire or windstorm partially or wholly destroys a property right there is no "sale or exchange" or passage of title, yet 117(j) clearly applies to the gain derived therefrom. Why then should 117(j) treatment be denied in the instant case where the facts constitute a typical example of "seizure" and "requisition"?

It is precisely because "the singling out of sales and exchanges as the only dispositions producing capital gain treatment proved too restrictive with respect to both the taxpayer and the Government" that "certain non-sale or

exchange transactions are characterized as dispositions which result in capital gain treatment." Surrey and Warren, *Federal Income Taxation* (1955 Ed.), p. 552. The involuntary conversions enumerated in 117(j) are examples of dispositions which are entitled to capital gain treatment in their own right, independently of whether or not they are "sales or exchanges." Mertens, *Law of Federal Income Taxation*, §22.122, §22.1225, n. 91, 93, 97 and 98.

In *Helvering v. William Flaccus Oak Leather Co.*, 313 U.S. 247, 61 S. Ct. 878 (1941), the Supreme Court made it absolutely clear that there can be an "involuntary conversion" of property into money without there being a sale or exchange. The *Flaccus Oak* case was decided shortly before the enactment of 117(j). The Court held that "destruction" by fire, one of the involuntary conversions now enumerated in capital gain provisions of 117(j), was not a sale or exchange of property, and that therefore the indemnification received as the result of the destruction was not entitled to receive capital gain treatment as gains from the sale of capital assets. The Court stated that:

> "Generally speaking, the language in the Revenue Act, just as in any statute, is to be given *its ordinary meaning*, and the words 'sale' and 'exchange' are not to be read any differently." (Emphasis supplied.)
>
> * * * * *
>
> "The fact that §112(f), 26 U.S.C.A., Int. Rev. Act, page 695, characterizes destruction of property and indemnification for its loss as an involuntary conversion does not establish that the two events constituted a sale or exchange."
>
> * * * * *
>
> "We can find nothing in this language or in other sections of the Act which indicates, either expressly or by implication, that Congress intended to classify as '*sales or exchanges*' the involuntary conversions enumerated in §112(f)." (Emphasis supplied.)

The Court reasoned that destruction did not come within the ordinary meaning of "sale or exchange" and that therefore money received as the result thereof was not entitled to capital gain treatment.

Less than a year after the *Flaccus Oak* case was decided, Congress expressly granted capital gain treatment to the conversions enumerated in 112(f) by enacting 117(j) as part of the Revenue Act of 1942. Destruction was one of the conversions enumerated therein. Requisition and seizure are also enumerated. At that time the nation was at war. The possibility that wartime conditions would result in destruction or seizure of business properties was present. Congress was in the course of authorizing the Government to acquire the use and possession of whatever property interests, both realty and personalty, were needed for wartime purposes through the exercise of the powers of requisition, seizure and condemnation.[8]

None of the practical tax policy dangers arising in voluntary transactions by virtue of the "sale or exchange" requirement are incident to seizures and requisitions. For example, when dealing with voluntary transactions in which taxpayers freely arrange their own affairs, this Court has rightfully insisted that Section 117 be carefully construed so as to "protect the revenue against artful devices," to insure that the legislative intent manifested in 117 is carried out, and to insure that results are "not controlled by subtleties of draftsmanship but by their total effect." E.g., *Commissioner v. P. G. Lake, Inc.*, 356 U.S. 260, 78 S. Ct. 691; *Corn Products Refining Co. v. Commissioner*, 350 U.S. 46, 76 S. Ct. 20. In such cases there is a danger of taxpayers arranging their affairs so as to receive future income from ordinary sources

[8]See Appendix A.

as capital gain. E.g., *Hort v. Commissioner*, 313 U.S. 28, 61 S. Ct. 757 (1941), affirming 112 F. 2d 167 (2 Cir. 1940) and 39 B.T.A. 922.[9]

In fact, the reverse situation exists here. The Government, acting unilaterally and using its own artful and subtle devices, drafted its seizure directives so as to state that title shall remain in the carriers. The Government first used this language in an effort to avoid its obligation to pay compensation before the Motor Carrier Claims Commission. It claimed that property was not taken by seizure because no title was taken and that therefore the government action was mere regulation. Now the Government is using the same device in an effort to ignore the fact that Congress has granted capital gain treatment to gains resulting from property converted by seizure.[10]

[9]The taxpayer in the *Hort* case had contended that he was entitled to capital gain treatment under Section 101(c)(1) of the 1932 Code as a gain from the sale or exchange of capital assets. The Tax Court opinion held that the cancellation of a lease is not a "sale or exchange" and that therefore the proceeds were not entitled to receive capital gain treatment under that section. The Tax Court reasoned that neither "businessmen nor lawyers refer to the cancellation or forfeiture of a lease for consideration as a sale or exchange," and that the cancellation of a lease is not a sale or exchange "within the normally accepted meaning of those terms." This Court affirmed that result, holding that a lump sum payment by a lessee to a lessor-fee owner which is essentially a substitute for rental payments which the lessor would have received in the future should be taxed as ordinary income rather than as gain from the sale or exchange of capital assets.

Hence, the reasoning of the *Hort* case assumes (1) that the money in question was received in lieu of (as a substitute for) rental income which the taxpayer *would* actually have received in the future from rental, and (2) that the capital gain provision in issue has a sale or exchange requirement. Neither assumption is applicable in the instant case.

[10]Section 99 of the Technical Amendments Act of 1958 has no bearing on the capital gain issue before this Court. It relates solely to the year of taxability. The gross income for any one year includes all "gains" derived that year, capital or otherwise, as well as other income. 26 U.S.C.A. §22, Int. Rev. Code of 1939.

CONCLUSION

The decision of the Fifth Circuit, in reversing the Tax Court, should be affirmed.

Respectfully submitted,

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APPENDIX A

This Appendix contains two excerpts from the publication entitled "Acquisition of Property for Wartime Purposes" (U. S. Government Printing Office, 1944) which was published by the Lands Division of the Justice Department. These excerpts begin on pages 42 and 43 respectively.

"F. Requisitions

"*Requisition means direct appropriation of property by the Government for war purposes without condemnation proceedings. Congress has repeatedly authorized requisitioning in wartime or other national emergency.* Requisitioning is well established under the laws of nations. In occupied territory requisitioning is often initated by the military commander in order to provide for the necessities of the army of occupation. *During the war years 1917-18 requisitioning under congressional authority took place on a large scale even outside the zone of direct military operations. Recent legislation similarly authorizes requisitioning on a large scale during the present war.* The power of the Executive, even without statute, to requisition property in places under military government would seem to be clear. Requisitioning in belligerent territory has been exercised either through the civil authorities or by the military officers without such civilian intervention.

"The availability of the Tucker Act providing for the payment of compensation by the United States affords remedial procedure to the property owner where on occasion the Government expropriates property for war purposes without waiting to comply with the usual statutory acquisition requirements. However, in this connection it is usually not necessary to invoke the Tucker Act in *case of personalty inasmuch as recent emergency and war legislation directly constitutes very broad authority for requisitioning of personal property*, and provides

that the amount of just compensation shall be ascertained in accordance with the provision for *just compensation in the Fifth Amendment to the Constitution of the United States.*" (Emphasis supplied.) P. 43.

"28. Requisitioning

"Under the act of October 10, 1940, '*whenever the President determines that it is necessary in the interest of national defense or prosecution of war to requisition and take over for the use or operation by the United States, or in its interest, any* military or naval *equipment or munitions* or *component* parts thereof or *machinery, tools, or materials or supplies necessary* for the manufacture, servicing, or operation thereof, ordered, manufactured, procured, or possessed for export purposes, the exportation of which has been prohibited or curtailed' in accordance with the statutes authorizing export control, the President is '*authorized and empowered to requisition and take over for the said use or operation by the United States or in its interest any of the foregoing articles or materials.*' It is provided that 'the owner thereof shall be paid as compensation therefor such sum as the President shall determine to be fair and just.' If the owner is unwilling to accept the sum so determined as full and complete satisfaction he is to be paid 50 percent of the sum thus determined and may recover by action against the United States such additional sum as will, when added to the sum received, constitute the fair market value of such article or material without any allowance for prospective profits, punitive or other damages.

"Under the act of October 16, 1941, as amended by title VI *of the Second War Powers Act, whenever the President during the national emergency determines that* (1) the use of any military or naval equipment, supplies, or munitions or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, sup-

plies, or munitions is needed for the defense of the United States, (2) such need is immediate and impending and such as will not admit of delay or resort to other sources of supply, and (3) all other means of obtaining the *use of* such property for the defense of the United States upon fair and reasonable terms have been exhausted, *he is authorized to requisition such property* for the defense of the United States upon payment of fair and just compensation. The President shall determine the amount of fair and just compensation in accordance with the provision for just compensation in the fifth amendment to the Constitution. If the owner is unwilling to accept the sum thus determined as full and complete compensation he is to be paid 50 percent of such amount and may sue the United States for the balance of what he regards as fair and just compensation.

"*The President's authority to requisition* under these statutes has by Executive orders been delegated to various agencies, subject to directions designed to protect the system of priorities and allocation of materials required under the war-production program. Requisitioning by the agencies accordingly is made subject to approval by the War Production Board with respect to whether the requisitioning is consistent with the priorities and allocation program of the general production and supply plans of the War Production Board. The War Production Board has issued an elaborate set of regulations to systematize this portion of its relations with the other agencies under the requisitioning acts.

"*In addition to these general requisitioning statutes* there are certain special enactments covering more limited fields which have received considerable attention. In time of actual or threatened war, stores, supplies, and *materials of war* previously purchased from the United States by any State, Territory, or the District of Columbia *for the use of the National Guard may be requisitioned by* the United States for military use. *When so*

requisitioned, credit for the ultimate return of such property in kind is provided for. Under the act of August 29, 1916, the President in time of war is empowered through the Secretary of War *to take possession and assume control of any system or systems of transportation or* any part therof and to utilize the same to the exclusion as far as may be necessary of all other traffic thereon, for transfer or transportation of troops, war material, and equipment, or for such other purposes connected with the emergency as may be needful or desirable. Under the act of June 29, 1936, whenever the President shall proclaim that the security of the national defense makes it advisable, or during any national emergency declared by proclamation of the President, it shall be lawful for the Maritime Commission *to requisition or purchase any vessel* or other watercraft owned by citizens of the United States, or under construction within the United States, [or] *for any period during such emergency to requisition or charter the use of any such property.* Just compensation for the property or use thus requisitioned is to be paid, but the owner is not to be paid for any consequential damages.

"Under the act of August 18, 1942, the War Shipping Administration, with the approval of the Secretary of the Navy, or his designee, or such other officers or agencies as the President may designate, is given the power *to take or appropriate for the use of the United States property captured at sea.* By the act of June 6, 1941, authority is given to the President during the existing national emergency 'to purchase, *requisition for any period during such emergency,* charter or *requisition* the *use of or take over the title to or the possession of for such use or disposition as he shall direct,* any foreign merchant vessel which is lying idle in waters within the jurisdiction of the United States, including the Philippine Islands and the Canal Zone, and which is necessary to the national defense.' This statute also provides that compensation 'shall be determined and made

to the owner or owners of any such vessel in accordance with applicable provisions of the Merchant Marine Act of 1936.

"*In addition to the requisitioning statutes above mentioned may be noted* also the type of statute, of which there are many with variations in detail, under which authority is granted to the Secretary of War or the Secretary of the Navy or other agencies to establish or develop or to acquire or construct facilities of various descriptions, including vessels, vehicles, and other war equipment and supplies or materials requisite for the manufacture or construction of such facilities, and also the provisions in the National Defense Act and related legislation authorizing under certain circumstances *the taking over of industrial plants.*" (Emphasis supplied.) PP. 71-73.

APPENDIX B

On pp. 2-4 of the transcript of the Hearings Before the U. S. Senate Committee on Military Affairs on S. 1579 which is entitled "A Bill to Authorize the President of the United States to Requisition Certain Property for the Use of or Disposition by the United States" (U. S. Government Printing Office, Washington, 1941), a letter from the acting Secretary of War, Robert P. Patterson, to the Chairman of the Senate Committee on Military Affairs is reprinted. It was a letter of transmittal which accompanied the proposed bill which was intended to broaden the acquisitioning authority of the President by granting to him a blanket power to requisition property required for national defense purposes. The letter summarized some of the statutes passed during or since the World War I emergency which authorized the expropriation of property for emergency purposes by requisition and condemnation. The property rights which were requisitioned in these statutes were generally the right to possess, use and control the property in question. Condemnation statutes also authorized the taking for temporary or indefinite periods. This letter in part reads as follows:

> "The following existing statutes authorize the expropriation of various types of personal property under certain conditions:
>
> "The act of June 3, 1916 (39 Stat. 215; 50 U.S. Code 79), which authorizes the *condemnation of lands*, rights-of-way, materials, minerals and processes necessary for the construction and operation of nitrate plants.
>
> "The act of August 29, 1916 (39 Stat. 645; 10 U.S. Code 1361), which empowers the President, in time of war, *to take possession and assume control* of any system or systems of transportation, or any part thereof.

"The act of July 9, 1918 (40 Stat. 888; 50 U.S. Code 172), which authorizes the *condemnation of timber*, sawmills, camps, machinery, logging roads, rights-of-way, equipment, materials, supplies, and any works, property, or appliances suitable for the effectual production of lumber and timber products when such property is needed for the production, manufacture, or building of aircraft, drydocks, or vessels; their apparel or furniture, for housing of certain Government employees, and for the procurement of materials and equipment for aircraft, drydocks, and vessels.

"The act of June 10, 1929 (41 Stat. 1072; 16 U.S.C. 809), which authorizes the President *'to take possession of project works* erected by holders of Federal licenses for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States, whenever the President deems such action necessary for the national safety.

"The act of July 2, 1926, section 10(g) (44 Stat. 784; 10 U.S.C. 310), which authorizes, under specified circumstances, the *use by the United States of aircraft designs.*

"The act of June 19, 1934 (48 Stat. 1104; 47 U.S.C. 606), which authorizes the President to 'take over and *use any radio station during any war*, or threat of war, or state of public peril or disaster, or other national emergency declared by proclamation of the President, or in order to preserve the neutrality of the United States.

"The act of June 29, 1936, as amended (49 Stat. 2015; 46 U.S.C. 1242), which authorizes *the requisition of certain vessels or watercraft* whenever the President shall proclaim that the security of the national defense makes such action advisable or during any national emergency declared by proclamation of the President.

"The act of October 10, 1940 (Public, No. 829, 76th Cong), which authorizes the *requisition of property procured, processed, or manufactured for export*, the ex-

portation of which has been denied under section 6 of the act of July 2, 1940 (Public, No. 703, 76th Cong).

"During the World War Emergency in 1917 and 1918 the following statutes conferred authority *to requisition various types of property:*

"The act of September 7, 1916 (39 Stat. 731; 46 U.S.C. 809), which authorized the President to take *possession*, absolutely or temporarily, for any naval or military purpose, of *any vessel* purchased, leased, or chartered from the United States shipping Board.

"The act of March 4, 1917 (39 Stat. 1193), which authorized the President, upon certain conditions, *to take possession of and use any factory*, or any part thereof, for the production of ships or war material for the Navy.

"The act of June 15, 1917 (40 Stat. 182), which authorized the President to *requisition any contract* for the building, production, or purchase of ships or material, any plant for the production of ships or any part thereof, or any ship or the charter of any ship.

"The act of August 10, 1917 (40 Stat. 279), which authorized the President to *requisition foods, feeds, fuels*, and other supplies necessary to the support of Army or the maintenance of the Navy, or any other public use connected with the common defense, together with storage facilities for such supplies, and any factory, packing house, oil pipe line, mine, or plant, or part thereof.

"The act of August 10, 1917 (40 Stat. 282), which authorized the President to *commandeer any or all distilled spirits* for use in the manufacture of munitions and for other purposes.

"The act of August 10, 1917 (40 Stat. 284), which authorized the President, under certain conditions, *to take over and operate the plant or business of any producer of or dealer in coal or coke.*

"The act of March 1, 1918 (40 Stat. 438, which authorized the President to *requisition or condemn land,*

houses, buildings, fixtures, furnishings, and facilities for the use of employees of shipyards in which ships were being constructed for the United States.

"The act of April 22, 1918 (40 Stat. 535), which authorized the President to take *possession of any* street railroad, interurban *railroad*, or part thereof, and all cars, appurtenances, and franchises, or parts thereof, for the transfer and transportation of employees of shipyards or plants engaged in the construction of ships or equipment therefor for the United States.

"The act of May 16, 1918 (40 Stat. 550), which authorized the President to *requisition or condemn land*, houses, buildings, furnishings, improvements, *local transportation*, and general community utilities for the purpose of providing housing, local transportation and other general community utilities for industrial workers engaged in arsenals, navy yards, and industries essential to the national defense.

"The act of July 18, 1918 (40 Stat. 915), which authorized the President to *requisition the use or temporary possession or control of any drydocks*, wharves, or loading or discharging terminal facilities in any port of the United States, or warehouses, equipment, or terminal railways connected therewith.

"The act of October 5, 1918 (40 Stat. 1010), which authorized the President to *requisition and take over certain specified mineral substances and* ores, minerals, metallurgical products, metals, alloys, and chemical compounds described as necessaries, and any undeveloped or insufficiently developed or operated idle land, deposit, or mine, or any idle or partially operated smelter, or plant, or part thereof, producing or capable of producing said necessaries.

"The act of November 4, 1918 (40 Stat. 1022), which authorized the President to *requisition land* for the purpose of constructing, establishing, or extending any *shipbuilding* plant.

"The act of November 4, 1918 (40 Stat. 1029, which authorized the President to *requisition and take over lands*, buildings, and their equipment for *hospital facilities*.

"The provisions of one or more of these several statutes *include authority to requisition not only an entire plant or other installation, but 'any part thereof', to requisition a contract, and to requisition real property without resorting to the more cumbersome condemnation procedure*."..

In another letter to the Senate Committee, reprinted at pp. 89 and 90 of the transcript of the hearings, President Roosevelt pointed out that the bill which he was proposing was substantially similar in language to these earlier bills but granted the power to requisition any kind of property as opposed to a piecemeal grant of specific powers for particular types of property. It stated in part as follows:

"During the last similar emergency, the Government's need of broader requisitioning powers was met piecemeal.

"When a particular kind of property was needed, a particular requisitioning statute was drafted to cover that need. These *piecemeal statutes separately gave the Government requisitioning power over virtually everything* from distilled spirits required in the making of munitions to lumber needed for making aircraft This procedure caused unwarranted delays in waiting for the necessary legislation, and it resulted in the enactment of at least 17 different statutes, all containing language substantially similar to that of the present bill.

"This prior experience shows that it would be difficult and even impossible for us now to catalog each and every one of the Government's needs in advance. * * *

"I know that a people who have agreed to draft themselves into military service will not hesitate to approve

any draft of their own equipment and property which is necessary for defense."

Also, at p. 231 of the same Senate hearings several senators discussed whether the authority to requisition property for defense purposes in that bill would enable the seizure of transportation facilities such as steamships and railroads, and whether the power of requisition could be exercised to take either the use of property or the title to that property or both. The narrative of the senators reads as follows:

"Senator Austin: That is a grand point. Now I wish you would use, after the word 'requisition', the words 'the use of', you see.

"Right down here where it says he is authorized to requisition such property.

"I think if you put those words in you would clarify this whole thing.

"Senator Lodge: Will that broaden it?

"Senator Austin: 'Requisition the use of.' No; it would not.

"Senator Lodge: It broadens it to include transportation service.

"Senator Austin: It would limit it. It takes it down to the question of use rather than title.

"Senator Lee: Would that include those that are usable or expendable?

"Senator Austin: Yes, it does involve consumption.

"Senator Lodge: This bill is contemplated to give the right to seize ships and railroads, isn't it? Isn't that correct?

"I would like to get an answer to that question. Does not this bill enable the seizure of transportation facilities such as steamships and railroads?

"Senator Chandler: Any property necessary to the defense of the United States.

"Judge Patterson: Yes, I think it might.

"Senator Chandler: That takes it all in."

SUPREME COURT OF THE UNITED STATES

No. 359.—October Term, 1959.

Commissioner of Internal Revenue, Petitioner, v. Gillette Motor Transport, Inc.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 27, 1960.]

Mr. Justice Harlan delivered the opinion of the Court.

The question in this case is whether a sum received by respondent from the United States as compensation for the temporary taking by the Government of its business facilities during World War II represented ordinary income or a capital gain. The issue involves the construction and application of § 117 (j) of the Internal Revenue Code of 1939.

In 1944, respondent was a common carrier of commodities by motor vehicle. On August 4, 1944, respondent's drivers struck, and it completely ceased to operate. Shortly thereafter, because of the need for respondent's facilities in the transportation of war materiel, the President ordered the Director of the Office of Defense Transportation to "take possession and assume control of" them. The Director assumed possession and control as of August 12, and appointed a Federal Manager, who ordered respondent to resume normal operations. The Federal Manager also announced his intention to leave title to the properties in respondent and to interfere as little as possible in the management of them. Subject to certain orders given by the Federal Manager from time to time, respondent resumed normal operations and continued so to function until the termination of all possession and control by the Government on June 16, 1945.

Pursuant to an Act of Congress creating a Motor Carrier Claims Commission, 62 Stat. 1222, respondent presented its claim for just compensation. The Government contended that there had been no "taking" of respondent's property but only a regulation of it. The Commission, however, determined that by assuming actual possession and control of respondent's facilities, the United States had deprived respondent of the valuable right to determine freely what use was to be made of them. In ascertaining the fair market value of that right, the Commission found that one use to which respondent's facilities could have been put was to rent them out, and that therefore their rental value represented a fair measure of respondent's pecuniary loss. The Commission noted that in other cases of temporary takings, it has typically been held that the market value of what is taken is the sum which would be arrived at by a willing lessor and a willing lessee. Accordingly, it awarded, and the respondent received in 1952, the sum of $122,926.21, representing the fair rental value of its facilities from August 12, 1944, until June 16, 1945, plus $34,917.78, representing interest on the former sum, or a total of $157,843.99.

The Commissioner of Internal Revenue asserted that the total compensation award represented ordinary income to respondent in 1952. Respondent contended that it constituted an amount received upon an "involuntary conversion" of property used in its trade or business and was therefore taxable as long-term capital gain pursuant to § 117 (j) of the Internal Revenue Code of 1939.*

*Section 117 (j) provides as follows:

"Gains and losses from involuntary conversion and from the sale or exchange of certain property used in the trade or business.

"(1) Definition of property used in the trade or business. For the purposes of this subsection, the term 'property used in the trade or business' means property used in the trade or business, of a character

The Tax Court, adopting its opinion in *Midwest Motor Express, Inc.*, 27 T. C. 167, aff'd, 251 F. 2d 405 (C. A. 8th Cir.), which involved substantially identical facts, held that the award represented ordinary income. The Court of Appeals, one judge dissenting, in this instance reversed. 265 F. 2d 648. We granted certiorari because of the conflict between the decisions of the two Circuits. 361 U. S. 881.

Respondent stresses that the Motor Carrier Claims Commission, rejecting the Government's contention that only a regulation, rather than a taking, of its facilities had occurred, found that respondent had been deprived of *property*, and awarded compensation therefor. That is indeed true. But the fact that something taken by the Government is property compensable under the Fifth Amendment does not answer the entirely different question whether that thing comes within the capital-gains ~~provisions~~ of the Internal Revenue Code. Rather, it is necessary to determine the precise nature of the property taken. Here the Commission determined that what

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which is subject to the allowance for depreciation provided in section 23 (*l*), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business . . . .

"(2) General rule. If, during the taxable year, the recognized gains upon sales or exchanges of property used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. . . ."

respondent had been deprived of, and what the Government was obligated to pay for, was the right to determine freely what use to make of its transportation facilities. The measure of compensation adopted reflected the nature of that property right." Given these facts, we turn to the statute.

Section 117 (j), under which respondent claims, is an integral part of the statute's comprehensive treatment of capital gains and losses. Long-established principles govern the application of the more favorable tax rates to long-term capital gains: (1) There must be first, a "capital asset," and second, a "sale or exchange" of that asset (§ 117 (a)); (2) "capital asset" is defined as "property held by the taxpayer," with certain exceptions not here relevant (§ 117 (a)(1)); and (3) for purposes of calculating gain, the cost or other basis of the property (§ 113 (b)) must be subtracted from the amount realized on the sale or exchange (§ 111 (a)).

Section 117 (j), added by the Revenue Act of 1942, effects no change in the nature of a capital asset. It accomplishes only two main objectives. First, it extends capital-gains treatment to real and depreciable personal property used in the trade or business, the type of property involved in this case. Second, it accords such treatment to involuntary conversions of both capital assets, strictly defined, and property used in the trade or business. Since the net effect of the first change is merely to remove one of the exclusions made to the definition of capital assets in § 117 (a)(1), it seems evident that "property used in the trade or business," to be eligible for capital gains treatment, must satisfy the same general criteria as govern the definition of capital assets. The second change was apparently required by the fact that this Court had given a narrow construction to the term "sale or exchange." *See Helvering* v. *Flaccus Leather Co.*, 313

U. S. 247. But that change similarly had no effect on the basic notion of what constitutes a capital asset.

While a capital asset is defined in § 117 (a)(1) as "property held by the taxpayer," it is evident that not everything which can be called property in the ordinary sense and which is outside the statutory exclusions qualifies as a capital asset. This Court has long held that the term "capital asset" is to be construed narrowly in accordance with the purpose of Congress to afford capital-gains treatment only in situations typically involving the realization of appreciation in value accrued over a substantial period of time, and thus to ameliorate the hardship of taxation of the entire gain in one year. *Burnet* v. *Harmel*, 287 U. S. 103, 106. Thus the Court has held that an unexpired lease, *Hort* v. *Commissioner*, 313 U. S. 28, corn futures, *Corn Products Co.* v. *Commissioner*, 350 U. S. 46, and oil payment rights, *Commissioner* v. *P. G. Lake, Inc.*, 356 U. S. 260, are not capital assets even though they are concededly "property" interests in the ordinary sense. And see Surrey, Definitional Problems in Capital Gains Taxation, 69 Harv. L. Rev. 985, 987–989 and Note 7.

In the present case, respondent's right to use its transportation facilities was held to be a valuable property right compensable under the requirements of the Fifth Amendment. However, that right was not a capital asset within the meaning of §§ 117 (a)(1) and 117 (j). To be sure, respondent's facilities were themselves property embraceable as capital assets under § 117 (j). Had the Government taken a fee in those facilities, or damaged them physically beyond the ordinary wear and tear incident to normal use, the resulting compensation would no doubt have been treated as gain from the involuntary conversion of capital assets. See, *e. g.*, *Guy L. Waggoner*, 15 T. C. 496; *Walter A. Henshaw*, 23 T. C. 176. But here the Government took only the right to determine the use to which those facilities were to be put.

That right is not something in which respondent had any investment, separate and apart from its investment in the physical assets themselves. Respondent suggests no method by which a cost basis could be assigned to the right; yet it is necessary, in determining the amount of gain realized for purposes of § 117, to deduct the basis of the property sold, exchanged, or involuntarily converted from the amount received. § 111 (a). Further, the right is manifestly not of the type which gives rise to the hardship of the realization in one year of an advance in value over cost built up in several years, which is what Congress sought to ameliorate by the capital-gains provisions. See cases cited, *ante*, p. —. In short, the right to use is not a capital asset, but is simply an incident of the underlying physical property, the recompense for which is commonly regarded as rent. That is precisely the situation here, and the fact that the transaction was involuntary on respondent's part does not change the nature of the case.

Respondent lays stress on the use of the terms "seizure" and "requisition" in § 117 (j). More specifically, the section refers to the "involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) *of property used in the trade or business and capital assets* . . . ." (Emphasis added.) It is contended that the Government's action in the present case is perhaps the most typical example of a seizure or requisition, and that therefore, Congress must have intended to treat it as a capital transaction. This argument, however, overlooks the fact that the seizure or requisition must be "of property used in the trade or business [or] capital assets." We have already shown that § 117 (j) does not change the long-standing meaning of those terms and that the property taken by the Government in the present case does not come within them. The words "seizure" and "requisition" are not thereby

deprived of effect, since they equally cover instances in which the Government takes a fee or damages or otherwise impairs the value of physical property.

We conclude that the amount paid to respondent as the fair rental value of its facilities from August 12, 1944, to June 16, 1945, represented ordinary income to it. *A fortiori*, the interest on that sum is ordinary income. *Kieselbach* v. *Commissioner*, 317 U. S. 399.

Reversed.

MR. JUSTICE DOUGLAS dissents.